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Articles

The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse

Serena Mayeri*

INTRODUCTION

In September 1977, hundreds of African American parents and students picketed the Amite County courthouse in Liberty, Mississippi. Holding banners that read “End Sex Discrimination,” they launched a month-long

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boycott of area public schools.¹ The African American community of Amite County was protesting a regime of sex segregation conceived in the immediate aftermath of *Brown v. Board of Education* and implemented fifteen years later, when the Supreme Court established school districts' "affirmative duty" to abolish dual school systems for black and white children.² When whites in many parts of the South threatened to shut down public schools rather than desegregate, sex segregation had offered a promising antidote to fears of racial "amalgamation." Now, it was African American families fed up with sex separation who kept their children home. Their story, and the legal battles fought in their name, are the focus of this article.

"Jane Crow,"³ the term I will use to refer to the use of sex segregation in racial desegregation plans, represents a little-studied phenomenon in the legal and social history of race and sex in the postwar southern United States.⁴ Examining the theory and practice of Jane Crow helps to elucidate the cultural ramifications of, and interactions among, racial integration, shifting sexual mores, gender politics, and legal change during this period. Debates and litigation over Jane Crow also exemplify a series of transformations in antidiscrimination law and discourse between the 1950s and the late 1970s. In particular, the sex segregation controversy reveals profound shifts in the conceptualization of the constitutional harm of discrimination and in the construction of the relationship between race and sex inequality.

Before the Supreme Court declared racial segregation unconstitutional in *Brown v. Board of Education*, Jim Crow's defenders often used the unquestioned legitimacy of sex segregation to illustrate the absurdity of outlawing racial segregation—keeping black from white was as natural as separating male from female, the argument went. *Brown* permanently

1. Daniel Sheridan, *School Boycott Leader Vows to Continue*, NATCHEZ DEMOCRAT, Aug. 31, 1977 (on file with the Library of Congress, Records of the National Association for the Advancement of Colored People [hereinafter "Records of the NAACP"], V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

2. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 437 (1968).

3. I use "Jane Crow" as a shorthand because it neatly captures the interconnections and overlap between sex segregation and Jim Crow. It should be noted, however, that the term "Jane Crow" apparently originated in the writings of the pioneering civil rights lawyer and feminist Pauli Murray in the 1940s, and referred to sex discrimination more generally. The term first achieved widespread dissemination in 1965, when Murray, along with Justice Department attorney Mary O. Eastwood, published a pathbreaking article entitled, "Jane Crow and the Law." See Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). For more on Murray and "Jane Crow," see, for example, Susan Ware, *Dialogue: Pauli Murray's Notable Connections*, 14 J. WOMEN'S HIST. 54 (2002). On Murray's contributions to feminist legal strategy in the 1960s and early 1970s, see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004).

4. Two recent articles have included brief discussions of these cases. See Jill E. Hasday, *The Principle and Practice of Women's 'Full Citizenship': A Case Study of Sex Segregated Public Education*, 101 MICH. L. REV. 755 (2002); Verna C. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15; see also Jack Balkin, *Is There a Slippery Slope from Single-Sex Education to Single-Race Education?*, 37 J. OF BLACKS IN HIGHER EDUC. 126 (2002).

disrupted this neat syllogism. As Part I of this article describes, in the wake of what some white Southerners called “Black Monday,” sex segregation struck many observers as the perfect answer to fears that racial integration would lead inexorably to social intimacy and, ultimately, to interracial marriage and the horrors of “amalgamation,” or “mongrelization.” Many southern states passed laws authorizing the separation of students by sex, and some of the very few school districts that implemented desegregation in the first fifteen years after *Brown* considered or employed sex segregation. While there certainly was disagreement over the desirability and efficacy of the sex segregation solution, few questioned its constitutionality during this period. After all, anti-miscegenation laws remained on the books until 1967,⁵ and civil rights proponents were reluctant to vindicate segregationist propaganda by even hinting that racial equality required black boys to attend school with white girls. And though a few commentators suggested that sex segregation might impose a racial “badge of inferiority,” virtually no one characterized Jane Crow as sex discrimination.

Part II chronicles the first shift in Jane Crow law and discourse, which occurred in the aftermath of the Supreme Court’s 1968 mandate that Southern school districts expeditiously produce and implement desegregation plans designed to create racially “unitary” school systems.⁶ A number of school districts in several Southern states included sex segregation in these plans, prompting resistance from many African American communities, and, in some cases, federal government intervention. Objectors contended that sex segregation, in this context, “perpetuate[d] racial segregation by subterfuge.”⁷ The Fifth Circuit responded by establishing a “racial motivation standard” to evaluate the legality of sex segregation schemes: courts were to inquire into whether the plans were motivated by “racial discrimination,” or rather stemmed from legitimate “educational purposes.”⁸ Though everyone understood—and many acknowledged outside of court—that fears about the social implications of racial integration were the real impetus for sex separation, the racial motivation standard encouraged school districts to manufacture race-neutral justifications for Jane Crow. Many of the “educational purposes” cited by school districts, such as the virtues of sex-specific curricular specialization and the need to rescue boys from the “feminized” classroom, reflected the failure of emerging anti-sex-discrimination norms

5. *Loving v. Virginia*, 388 U.S. 1 (1967).

6. *Green*, 391 U.S. at 440.

7. Brief of Appellants at 9, *Smith v. Concordia Parish Sch. Bd.*, No. 28342 (5th Cir. Oct. 1, 1969) (on file with the National Archives and Records Administration [hereinafter “NARA”], Southwest Regional Division [hereinafter “S.W. Reg. Div.”], RG 276, United States Court of Appeals for the Fifth Circuit [hereinafter “Fifth Circuit”], Case Files, Box 4235, 28342-28349).

8. *United States v. Amite County*, No. 28030 (5th Cir. Dec. 19, 1969) (“[I]s racial discrimination the motivation for the plan or does it have its basis in educational purposes?”). The term “racial motivation standard” is my own shorthand.

to penetrate Jane Crow discourse. While many had come to view Jane Crow as racially discriminatory, neither litigants nor judges raised any qualms relating to sex discrimination in the late 1960s and early 1970s.

The women's rights revolution changed all that, as Part III relates. The explosion in legal consciousness of sex discrimination between 1970 and 1977—the result of advocacy, legislation, and litigation—transformed the debate over sex segregation. By 1974, a whole host of new legal tools and theories were available to opponents of Jane Crow, including Title IX of the Education Amendments of 1972,⁹ the Equal Educational Opportunity Act of 1974,¹⁰ and a new constitutional equal protection jurisprudence.¹¹ Plaintiffs in some Jane Crow cases, and advocates from groups like the American Civil Liberties Union, the National Organization for Women, and the American Friends Service Committee, now argued that sex segregation was not only race discrimination, but sex discrimination. The school districts' defense of sex segregation, which emphasized the benefits of single-sex schools to boys and the virtues of sex-specific curricula that (to feminists) disadvantaged girls, made salient a particular version of the sex discrimination argument. This argument emphasized the psychological and material harms that sex segregation imposed upon girls, and framed those harms as analogous to the injuries visited upon black children by racial segregation.

Calling sex segregation sex discrimination provided advocates with a new and compelling argument against Jane Crow, and offered the women's rights movement a powerful example of invidiously motivated separation of the sexes at a time when such separation largely was viewed as benign. But this analogy-based sex discrimination model, for all of its rhetorical and strategic advantages, failed to capture what was at stake for those arguably most affected by Jane Crow: African American families in

9. 20 U.S.C. § 1681 (2005).

10. See Equal Educational Opportunity Act of 1974, § 202(a)(1), *codified at* 20 U.S.C. § 1701(a)(1) (“[A]ll children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin”); *id.* § 203(a)(1), *codified at* 20 U.S.C. § 1702(a) (“The Congress finds that . . . the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment”); *id.* § 204, *codified at* 20 U.S.C. § 1703 (“No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such students were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student”); *id.* § 296, *codified at* 20 U.S.C. § 1705 (“[T]he assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.”).

11. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

the sex-segregating school districts of Georgia, Louisiana, and Mississippi. As I argue in Part IV, some African American communities came to evaluate the efficacy of sex segregation in pragmatic terms, based on its success in keeping white students and government funds in the public schools. Where they perceived sex separation as retaining white enrollment in, and financial contribution to, public schools, many African Americans apparently were willing to put up with this “less than ideal” policy. In contrast, in sex-segregating school districts where whites abandoned the public schools in large numbers and withdrew their financial support, black resentment and protest of Jane Crow increased during the 1970s.

African Americans affected by Jane Crow also expressed the harm of sex segregation in ways not captured by the dominant legal sex discrimination paradigm. They did not emphasize psychological and material damage inflicted on girls in particular, but rather voiced broader concerns about the distribution of political power and the proper socialization and education of children. They stressed the undemocratic imposition of sex segregation by white officials on blacks; the insidious implications of a policy intended to keep black boys away from white girls; the arbitrary limitations on both male and female curricular choice; the obstacles to healthy, heterosocial interaction between boys and girls; and students’ lack of preparation for a sex-integrated world.

Recovering the Jane Crow cases and the debates they adjudicated helps us to see more concretely the stakes of school desegregation for black and white Southern families, for school officials, for the civil rights and women’s rights movements, and for the relationship between legal advocacy and grassroots protest. But the story of Jane Crow has thus far been little more than a footnote to the history of sex-segregated education and of white resistance to racial desegregation. Part V explores the reasons for the Jane Crow cases’ legal obscurity, describing their legal resolution under a little-noticed statutory provision and explaining why the sex discrimination argument against sex segregation narrowly failed in the Supreme Court. Part VI concludes by reflecting upon each phase of the Jane Crow debate and upon the consequences of the transformation of anti-discrimination discourse that this controversy embodied.

I. “ONE FORM OF SEGREGATION THAT IS PERFECTLY LEGAL”: THE SEX SEPARATION SOLUTION

This Part locates the origins of sex segregation proposals in the aftermath of the *Brown* decision and describes the politics and law of sex segregation in the years before the Supreme Court required widespread racial desegregation. As the first section describes, *Brown* revitalized a longstanding discourse that linked racial integration to sexual disorder and the decline of civilized humanity. Cries of “amalgamation” and

“mongrelization” in *Brown*’s wake prompted politicians, journalists, and ordinary citizens to suggest sex segregation as a solution to the problem of racial integration. Sex segregation proposals served a variety of political purposes. Some expressed revulsion against interracial intimacy, while others reflected a genuine desire to ease the transition to an integrated society. But as the second section shows, whatever its underlying impetus, sex segregation enjoyed virtually unquestioned constitutional validity in the decade and a half after *Brown*. During this period, almost no one suggested publicly that separate schools for male and female students might constitute illegal discrimination.

A. “To Allay the Worst Fear”: Sex Segregation Proposals in the *Brown* Decade

In the century following the Civil War, courts and legal scholars often used the “naturally” separate education of the sexes to rationalize the legality of school segregation by race. In 1878, for instance, a federal court in Louisiana rejected a challenge to racial segregation in the state’s public schools, declaring, “Equality of right does not necessarily imply identity of rights.”¹² If the Constitution’s equal protection guarantee prohibited racial separation, the court went on to suggest, the equality principle would also mandate “educating children of both sexes, or children without regard to their attainments or age in the same school.”¹³ Such a result was clearly absurd.¹⁴ Eight decades later, attorney John W. Davis hoped the United States Supreme Court would see things the same way: if the Court outlawed racial school segregation, he argued in 1952, there would be no legal basis for separating students on any number of perfectly legitimate grounds, such as age, ability—or sex.¹⁵

The *Brown* decision did not put such arguments to rest; quite the contrary.¹⁶ But in the post-*Brown* era, sex-segregated schooling became

12. *Bertonneau v. Bd. of Directors*, 3 F. Cas. 294, 295-96 (C.C.D. La. 1878).

13. *Id.*

14. Federal district Judge William B. Woods, later an Associate Justice of the U.S. Supreme Court, wrote in *Bertonneau*,

[T]he sole grievance . . . is that complainant’s children, being of African descent, are not allowed to attend the same public schools as those in which children of white parents are educated. White children and colored children are compelled to attend different schools. That is all. The state . . . had the right to manage its schools in the manner which, in its judgment, will best promote the interests of all. The state may be of the opinion that it is better to educate the sexes apart. By such a policy can it be said that the equal rights of either sex are invaded?

Id. For more on the *Bertonneau* case, see LIVA BAKER, *THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED-YEAR STRUGGLE TO INTEGRATE THE SCHOOLS* 29-31 (1996).

15. Philip Dodd, *Court Takes Up Segregation in Public Schools*, CHI. DAILY TRIB., Dec. 10, 1952, at 6. The context for Davis’s argument was the Supreme Court’s first consideration of the school segregation cases that would later be known as *Brown v. Board of Education*. For more on Davis, see WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* (2d ed. 1990).

16. For instance, critics mocked *Brown*’s holding that racial school segregation was unconstitutional by suggesting that the ruling, by extension, would invalidate all-male colleges and

salient in a different way: as a palliative for white Southern fears that racially mixed schools would lead down a slippery slope toward interracial marriage and social equality. "The ultimate aim and goal of NAACP leaders in the present segregation fight," warned Georgia Governor Herman E. "Eugene" Talmadge in 1955, "is the complete intermingling of the races in housing, schools, churches, public parks, public swimming pools and even in marriage."¹⁷ The unavoidable result of such social integration would be a "mongrel race in which the strongest and best features of both races have been destroyed," wrote Talmadge.¹⁸ Such proclamations, along with well-known sociological analyses that linked segregation with fears of "miscegenation," convinced many Americans that visceral discomfort with interracial intimacy lay at the heart of Southern resistance to integration.¹⁹

Indeed, it is almost impossible to overstate the pervasiveness of this discourse of "mongrelization" and "amalgamation" in the wake of *Brown*.²⁰ Virtually every issue of the segregationist Citizens' Council's publication warned, in lurid terms, that desegregation would lead inevitably to interracial marriage, and to the degeneration of the white race.²¹ Popular segregationist screeds like Judge Tom P. Brady's *Black Monday: Segregation or Amalgamation, America Has Its Choice* and Senator Theodore Bilbo's *Take Your Choice: Separation or Mongrelization* minced no words in forecasting racial integration's

military academies, which seemed a patently ridiculous result. Lena H. Reynolds of Berkeley, California, wrote to two major newspapers in 1956:

Since the Supreme Court has decreed that segregation in the public schools must end, and, since the Military Academy at West Point and the Naval Academy at Annapolis most certainly are public educational institutions, what will happen if militant females, relying on the politicians' pledges of 'equal rights for women,' apply for but are refused admission to these public schools? Will the Supreme Court decide that segregation of the sexes must end because of the inferiority complex which this unequal treatment has been engendering in the women of the United States? Who can tell what Joan of Arc is being denied her 'equal opportunity' for a military career?

Lena H. Reynolds, Letter to the Editor, *Discrimination?*, L.A. TIMES, Sept. 9, 1956, at B4; Lena H. Reynolds, Letter to the Editor, *Unequal Treatment*, WALL ST. J., Sept. 13, 1956, at 10. See also *infra* note 77.

17. Herman E. Talmadge, *Intermingling and Inter-marriage*, in YOU AND SEGREGATION 42 (1955). For more on Talmadge, see WILLIAM ANDERSON, *THE WILD MAN FROM SUGAR CREEK: THE POLITICAL CAREER OF EUGENE TALMADGE* (1975).

18. Talmadge, *supra* note 17, at 44. See also Editorial, *To Allay the Worst Fear*, CHRISTIAN SCI. MONITOR, July 7, 1954, at E-2 ("When the widely respected Governor of South Carolina, James F. Byrnes, told a correspondent of this newspaper he opposes ending racial segregation in the public schools chiefly because it 'will lead to mongrelization' he was voicing the great underlying fear that besets many of the white people of the South.").

19. See, e.g., GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

20. On the prominence of "amalgamation" fears in the theological debate over segregation, see Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AM. HIST. 119 (2004). One state legislator succinctly summed up the stance of numerous white Southern politicians in 1958: "All laws for the separation of races are largely a defense . . . protecting the law against intermarriage. The real leaders of the [anti-segregation] movement know what they want: intermarriage." Quoted in Paul Simon, *A Southern Survey*, CHRISTIAN SCI. MONITOR, Aug. 26, 1958, at 9.

21. For more on the Citizens' Council's first decade, see NEIL R. McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64* (1971).

ultimate result—intermarriage culminating in the irreversible decline of civilization.²² The specter of interracial sex served as a reliable rhetorical weapon. For instance, the powerful Louisiana machine politician Leander Perez declared to thunderous applause at a 1960 Citizens' Council rally in New Orleans, "Don't wait for your daughters to be raped by these Congolese. Don't wait until the burr-heads are forced into your schools. Do something about it now!"²³ It became an article of faith among many journalists that Southern resistance to desegregation was rooted in fears of interracial social intimacy; Northern press coverage of Southern white reaction often emphasized this dynamic.²⁴ President Dwight D. Eisenhower is said to have remarked to Chief Justice Earl Warren while the Court was considering *Brown* and its companion cases that white Southerners were "not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."²⁵ Even those who disparaged the "amalgamation" rhetoric as a political trick designed to avoid reasoned discussion by inflaming passions acknowledged its power to do just that.²⁶

Such rhetoric was nothing new, of course: cries of "amalgamation," and later, "miscegenation," had accompanied virtually every attempt at racial progress in the United States. Gunnar Myrdal's *An American Dilemma*, published in 1944, was only the most famous of many pre-*Brown* works that analyzed the appeal of these arguments to white Southerners in

22. THEODORE G. BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION (1947); TOM P. BRADY, BLACK MONDAY: SEGREGATION OR AMALGAMATION, AMERICA HAS ITS CHOICE (1955). Brady was a circuit court judge in Mississippi; Bilbo was Mississippi's Governor in 1916-20 and 1928-32, and a U.S. Senator from 1935 until his death in 1947. For more on Bilbo's political career, see CHESTER M. MORGAN, REDNECK LIBERAL: THEODORE G. BILBO AND THE NEW DEAL (1985).

23. *Louisiana: New Orleans Desegregates Schools; Federal Court Bans State Interference*, SOUTHERN SCHOOL NEWS, Dec. 1960, at 1, 9. In 1954, Perez had described how integration would lead inevitably to "amalgamation":

Beginning at the age of six, little white and Negro children—boys and girls—would be forced into continuous physical contact with each other in public schools and public school activities. They would study together, recite together, sing together, play together, sit together, talk together, and dance together. They would eat lunch together from food provided by the federal government The social theory behind this procedure is that the close and intimate association during the entire formative period of their lives would, in itself, produce integration or, in other words, amalgamation of the races. Fantastic as it may appear, the social aim is a Negroid South.

Quoted in JAMES CONAWAY, JUDGE: THE LIFE AND TIMES OF LEANDER PEREZ 105 (1973). For more on Perez, see generally BAKER, *supra* note 14; ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972 (1995); and GLEN JEANSONNE, LEANDER PEREZ, BOSS OF THE DELTA (1977).

24. See, e.g., Jim Bishop, *Racial Tug-of-War Jolts New Orleans*, WASH. POST, Mar. 27, 1956, at 1; Wilma Dykeman & James Stokely, *Inquiry Into the Southern Tensions*, N.Y. TIMES, Oct. 13, 1957, at 221 (describing the centrality of sex to the furor over racial desegregation).

25. EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 291 (1977).

26. See, e.g., Editorial, *Resistance Rising Throughout the South*, WASH. POST, Sept. 20, 1955, at 12 ("By preying on sex fears—'mongrelization' is their favorite term—[the Citizens' Councils] have succeeded in arresting calm discussion of the issue.").

particular.²⁷ Still, as Renee Romano describes, *Brown* brought fears of “race-mixing” to the forefront of popular discourse once more.²⁸ The prospect of *school* desegregation was especially threatening to white Southerners, because it entailed a particular kind of social equality not as clearly implicated in other public settings.²⁹ Many saw children as especially susceptible to the corruption of interracial contact: if white children went to school alongside black children, how would they learn the etiquette of racial hierarchy?³⁰ Orators sentimentalized white children’s racial purity as they demonized “race mixing.” Governor Ross Barnett told Mississippians in a 1962 televised address, “There is no cause which is more moral and just than the protection of the integrity of our races. To this end, we as parents will do whatever is necessary to defend those who are most dear to us.”³¹

27. MYRDAL, *supra* note 19. Jane Dailey writes that “state antimiscegenation laws underpinned the edifice of racial segregation and discrimination in America, a fact advertised by students of southern social relations since the 1920s.” Jane Dailey, *The Theology of Massive Resistance: Sex, Segregation, and the Sacred after Brown*, in *MASSIVE RESISTANCE, SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* (Clive Webb ed., 2005) 151, 158. Other early works explicating the connection between anti-miscegenation fervor and white supremacy included JAMES WELDON JOHNSON, *ALONG THIS WAY* (1933); JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (1937); and LILLIAN SMITH, *KILLERS OF THE DREAM* (1949). Dailey, *supra*, at 158-59 & 176 n.30.

On the origins of the term “miscegenation,” see Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 24 J. NEGRO HIST. 274 (1949). For more on the twentieth-century history of opposition to interracial intimacy, see, for example, *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW* (Werner Sollors ed., 2000); JOHN P. JOHNSON, JR., *SCIENCE FOR SEGREGATION: RACE, LAW, AND THE CASE AGAINST BROWN V. BOARD OF EDUCATION* (2005); ALEX LUBIN, *ROMANCE AND RIGHTS: THE POLITICS OF INTERRACIAL INTIMACY, 1945-1954* (2005); RENEE ROMANO, *RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA* (2003); Julie Novkov, *Racial Constructions: The Legal Regulation of Interracial Marriage in Alabama, 1890-1934*, 20 L. & HIST. REV. 225 (2002); and Peggy Pascoe, *Miscegenation Law, Court Cases, and the Ideology of “Race” in Twentieth-Century America*, 83 J. AM. HIST. 44 (1996).

28. ROMANO, *supra* note 27, at 146.

29. On the particular threat posed by school desegregation, as opposed to other types of desegregation, see ROMANO, *supra* note 27, at 156; and CHARLES BOLTON, *THE HARDEST DEAL OF ALL: THE BATTLE OVER SCHOOL INTEGRATION IN MISSISSIPPI, 1870-1980* xvii, 108 (2005). Book-length defenses of racial segregation in education included JAMES JACKSON KILPATRICK, *THE SOUTHERN CASE FOR SCHOOL SEGREGATION* (1962); WILLIAM D. WORKMAN, JR., *THE CASE FOR THE SOUTH* (1960); and EDWARD P. LAWTON, *THE SOUTH AND THE NATION* (1963).

30. See ROMANO, *supra* note 27, at 159 (“[S]outhern parents were ultimately more concerned that white students in integrated schools would be taught that the races were equal. This ‘miseducation,’ as segregationists described it, would counter the inherent instinct of ‘race preference’ and would undermine whites’ instinctual propensity not to marry across the color line.”).

31. Ross Barnett, *Mississippi Still Says ‘Never’!*, *THE CITIZEN*, Sept. 1962, at 6 (transcript of television and radio address to the people of Mississippi, delivered Sept 13, 1962). Barnett continued, “There is no case in history where the Caucasian race has survived social integration. We will not drink from the cup of genocide!” *Id.* According to Karen Anderson, the fear “that desegregation portended a loss of patriarchal control so serious that it could lead to consensual interracial sex on the part of one’s own children” was “broadly shared” among segregationists.” Karen S. Anderson, *Massive Resistance, Violence, and Southern Social Relations: The Little Rock, Arkansas, School Integration Crisis, 1954-1960*, in *MASSIVE RESISTANCE*, *supra* note 27, at 203, 205.

As Elizabeth Gillespie McRae has demonstrated, white Southern women could also appeal to maternal prerogatives and responsibilities to bolster segregationist resistance. McRae describes how Florence Sillers Ogden of Mississippi “exploited the duties of white femininity for the cause of white supremacy and stoked the fires of massive resistance . . . present[ing] white women’s resistance to the *Brown* decision as a maternal responsibility to future generations, to public schools, and to

This palpable terror of interracial social contact and its apotheosis, interracial marriage, motivated many observers, North and South, to suggest sex separation as a solution to the desegregation dilemma. Southern governors and legislators of various political stripes embraced the idea that schools faced with the prospect of racial integration should be free to establish separate schools for boys and girls. Anticipating the imminent demise of Jim Crow laws, the Alabama legislature authorized sex separation in public schools in 1953.³² Over the next few years, Texas, South Carolina, Tennessee, Florida, and Louisiana followed suit, passing permissive legislation of various kinds.³³

The impulse to propose sex segregation as an antidote to the ills of racial integration reflected a complicated mixture of political posturing and pragmatism. The passage of laws authorizing sex separation in racially desegregated schools and classrooms often accompanied extremist "massive resistance" measures such as the mandatory closing of any school that allowed "race mixing."³⁴ For instance, when the New Orleans school system faced desegregation in 1960, the Louisiana legislature met in special sessions to pass a flurry of laws designed to preserve racial segregation.³⁵ A bill authorizing school segregation by sex was among the more moderate of these measures, and one of the few that escaped immediate federal judicial invalidation.³⁶

But while sex segregation proposals often appeared alongside extremist rhetoric and blunter tools of legal obfuscation, in some ways sex-segregated racial integration was the ultimate middle-ground position.³⁷ Though sex segregation proposals often had an aura of panic about them, by definition they countenanced the inevitability of some racial

politics" and using "the image of black boys attending schools with white girls." Elizabeth Gillespie McRae, *White Womanhood, White Supremacy, and the Rise of Massive Resistance*, in *MASSIVE RESISTANCE*, *supra* note 27, at 181, 188.

32. See Robert Alden, *South Trying Out New School Plan: Separation of Sexes in High Schools Tested as an Aid in Eventual Integration*, N.Y. TIMES, Sept. 22, 1957, at 55. Other sex segregation measures were also proposed in Alabama, including a 1957 bill that would have required female train passengers to consent to any male seatmate. That measure was vetoed by Governor Jim Folsom. *Segregation Bills Vetoed by Folsom*, WASH. POST, Sept. 28, 1957, at A8.

33. Joseph Ator, *Rash of Laws in South Seeks to Circumvent High Court*, CHI. DAILY TRIB., Nov. 23, 1957, at 9; *Florida Passes Law to Segregate Sexes*, N.Y. TIMES, May 27, 1959, at 29.

34. On "massive resistance," see, for example, *MASSIVE RESISTANCE*, *supra* note 27; NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* (1969); MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); and *THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA* (Matthew D. Lassiter & Andrew B. Lewis eds., 1998).

35. FAIRCLOUGH, *supra* note 23, at 242-43.

36. Federal district court Judge J. Skelly Wright, a steadfast opponent of Southern defiance, struck down most of these measures shortly after their passage. For more on Judge Wright, see BAKER, *supra* note 14; and ARTHUR SELWYN MILLER, *A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT* (1984).

37. Florida's assistant attorney general Ralph Odum presented it as such. He proposed sex segregation as one of three alternatives available to the state if it was to maintain viable public schools—the others being state subsidies for private segregated schools, and voluntary integration. Ator, *supra* note 33, at 9.

desegregation, without embracing its most unsettling social implications.³⁸ State Representative Jack Inman, who introduced Florida's sex segregation bill, called the proposal a "safety valve"—an emergency measure designed for the worst-case scenario.³⁹ Because it acknowledged racial desegregation as political reality, sex segregation appealed to some moderates as a realistic alternative to what they viewed as debilitating denial and defiance. For example, longtime Georgia state legislator Herschel Lovett warned his colleagues in 1961, "The die has been cast The more we take a posture of defiance, the worse shape we will be in."⁴⁰ Sex segregation could help Georgians accept racial desegregation in public schools, Lovett suggested.⁴¹

Sex separation proposals flourished not merely as popular symbolic gestures for state legislators seeking to burnish their segregationist credentials, or as last-ditch efforts to "soften the blow" of unavoidable desegregation,⁴² but also as sincere attempts to counteract Southern resistance to *Brown* and to smooth the way toward peaceful integration. In a July 1954 editorial, the *Christian Science Monitor* recommended sex separation in secondary schools in order to "allay the worst fear" of many white Southerners—that "placing white and Negro young people in the same schools will accelerate amalgamation by making social relationships between them so matter of course that interracial marriages might become acceptable."⁴³ The sex separation solution "should be acceptable to much

38. One Charlottesville, Virginia school board member objected to a sex segregation proposal on the ground that "The public is likely to . . . think we are panicking and anticipating much more desegregation than we are." *Charlottesville Schools to Segregate the Sexes*, WASH. POST, July 10, 1959, at C2. For discussions of shifting Southern perceptions about the inevitability—or lack thereof—of racial desegregation, see Michael J. Klarman, *Why Massive Resistance?*, in MASSIVE RESISTANCE, *supra* note 27, at 21, 29-33; and Tony Badger, *Brown and Backlash*, in MASSIVE RESISTANCE, *supra* note 27, at 39, 51-52.

39. "Mild" School Bills Given Legislative Sanction, SOUTHERN SCHOOL NEWS, July 1959, at 6. Florida's permissive law passed with little debate, and had the support of Governor Leroy Collins, who enjoyed a reputation for moderation.

40. Joseph H. Baird, *Georgia Grapples with Larger Issue*, CHRISTIAN SCI. MONITOR, Jan. 17, 1961, at 3.

41. *Id.* A Virginia congressional candidate told the *Washington Post* in 1956 that *Brown* was "the law of the land," but that the separation of students by sex would avoid integration "problems" like those he observed in the newly desegregated Washington, DC public schools. *Brenner Visits Schools Here, Scores Integration*, WASH. POST, June 16, 1956, at 19. An anonymous Virginia resident writing to the *Christian Science Monitor* in 1956 opined that "subconsciously . . . individual Virginians have accepted the idea of future integration." While the writer admitted that desegregation could not "take place successfully and at once throughout either Virginia or the South," a grade-by-grade, sex-segregated approach would help "to blunt the hard edges of resistance to integration." A Virginian, Letter to the Editor, *Integration Straws*, CHRISTIAN SCI. MONITOR, Apr. 27, 1956, at 20. As Col. Perry W. Thompson, a candidate for Florida secretary of state in 1960, put it, "We in the South must realize that our school segregation laws are in conflict with a Supreme Court decision." "But," he added, "this does not prevent separation of the sexes." *Florida: Political Activity*, SOUTHERN SCHOOL NEWS, Oct. 1960, at 8. Incidentally, Col. Thompson was the father of President Eisenhower's daughter-in-law. *Id.*

42. Judge L.A. Grayson of the Hillsborough County, Florida Criminal Court suggested the complete abolition of coeducation in public schools to "soften the blow" of race mixing, and "indefinitely" to "postpone the evil day" when racial barriers would fall. *Florida: What They Say*, SOUTHERN SCHOOL NEWS, Nov. 1958, at 10, 11.

43. *To Allay the Worst Fear*, *supra* note 18, at E-2.

of the Negro leadership, too," the *Monitor* argued, since those leaders were "no more eager to accelerate amalgamation than are their white brothers. They ask simply that the individual be not shackled by an inferiority imposed upon a whole race."⁴⁴

The *Monitor* had many allies: prominent Northern politicians and journalists frequently suggested the replacement of racial segregation with sex segregation.⁴⁵ In 1955, former Connecticut Senator Hiram Bingham wrote a much-publicized letter to South Carolina Governor James F. Byrnes proposing sex separation as an alternative to appease those who urged the abolition of public education if the state were forced to desegregate.⁴⁶ Liberal social commentator Walter Lippmann observed in 1956 that effective desegregation in the South might require "radical changes in school policy, say in the policy of coeducation."⁴⁷ Two years later, Lippmann opined that "in the Deep South, integration, plus coeducation, especially for teenagers, is impossible within the foreseeable future."⁴⁸ Ordinary citizens also trumpeted sex segregation as the perfect solution to the desegregation impasse. The analysis offered by Albert Jason of Oakland, California, was typical of numerous letters to the editor in the several years after *Brown*: sex separation, Jason argued, "certainly would eliminate the fear of parents that integration may cause problems of intermarriage and/or promiscuity [P]arents throughout the South as well as in other parts of our country, whether white or colored, would not object to integration, as long as the cause of moral turpitude has been removed."⁴⁹

44. *Id.*

45. In the summer of 1954, *Washington Post* columnist Malvina Lindsay noted a widespread movement to reconsider the benefits of coeducation in the wake of *Brown*. Malvina Lindsay, *Coeducation, Focus of New Questions*, WASH. POST, Aug. 19, 1954, at 16.

46. *Pupil Separation By Sex Suggested: Ex-Senator Bingham Writes Byrnes This Would Help Solve Segregation Woes*, N.Y. TIMES, Jan. 20, 1955, at 33. Immediately after *Brown*, Byrnes had identified sex as the heart of the problem with racial integration. "The pattern, Byrnes contended, is familiar—white girl in shorts plays tennis in the yard of a segregated school; Negro boy enters playground; the basic wall between the species begins to crumble, and social chaos has begun to envelope humanity." Edwin A. Lahey, *Byrnes on Integration*, WASH. POST, May 22, 1954, at 18. Byrnes may have been an ideal audience for sex segregation proposals, as he had urged his former colleagues on the Supreme Court to pursue desegregation implementation in a way that encouraged, rather than alienated, moderate leadership. See Badger, *supra* note 38, at 39, 44. For more on Byrnes, see DAVID W. ROBERTSON, *SLY AND ABLE: A POLITICAL BIOGRAPHY OF JAMES F. BYRNES* (1994).

47. Walter Lippmann, *The Platform and Segregation*, WASH. POST, Aug. 18, 1956, at 23.

48. Walter Lippmann, *Fundamental Issues on Integration Remain*, L.A. TIMES, Aug. 29, 1958, at B4.

49. Albert Jason, Letter to the Editor, *Segregate the Sexes*, WASH. POST, Oct. 2, 1957, at A10. One sex segregation proponent from Maryland suggested, a few weeks after *Brown*, that

[t]he problem is to find an action which complies with the letter and spirit of the law and still minimizes [white Southerners'] fear and distress. Segregation by sex . . . should fit that bill in many areas. It would eliminate racial discrimination without providing a basis for the miscegenation which is so feared in the South.

C.C. Van Vechten, Letter to the Editor, *Segregating Sexes*, WASH. POST, June 2, 1954, at 18. "As everybody knows," wrote Mitchell Rawson to the *New York Times* a few months later,

the historic position of the South is that the problem of the close association of the races is basically a biological one. Complete separation of the sexes, in separate buildings, would

Some sex segregation proponents euphemistically referred to “sex problems” or “adolescent problems” as barriers to students “applying themselves” in racially integrated schools.⁵⁰ But few failed to observe that fear of “amalgamation” lay at the root of the sudden enthusiasm for sex separation. *New York Times* columnist Arthur Krock wrote in 1956, “Apprehension that steady expansion of . . . interbreeding would be the result of propinquity in mixed schools of adolescents is the basic cause of the Southern resistance.”⁵¹ Therefore, Krock asserted, “the suggestion of separation by sexes goes to the heart of the controversy” over integration.⁵² When Florida’s governor signed that state’s sex separation bill in 1959, the wire service headline read, “Segregation by Sex: Florida

prevent the very worst results of the decision which are foreseen by many people of good will, white and black.

Mitchell Rawson, Letter to the Editor, *Segregation by Sexes*, N.Y. TIMES, Dec. 2, 1954, at 33. Alex T. Deutsch of Washington, D.C., agreed. “[S]eparating of the sexes may take . . . the curse out of integration,” he wrote in 1957, “since intermarriage is feared more than anything else as its consequence.” Alex T. Deutsch, Letter to the Editor, *Segregate the Sexes*, WASH. POST, Oct. 2, 1957, at A10. Donald Traylor of Norfolk, Virginia, wrote the following year that “the chief underlying objection to integration in the public schools is that it will lead to association of races in the schools, then on a social level, and hence, marriage between the races.” Sex separation would solve the problem, because “there would be no need for Negro and white students of the opposite sex to have any more association than they now have.” Donald H. Traylor, Letter to the Editor, *Partial Solution*, WASH. POST, Oct. 11, 1958, at A8. Sidney Rheinstein concurred:

Having been born and raised in the South, I think one of the main objections many Southerners have to integration is that they do not wish children of different sexes to mingle. It took a long time to have coeducation in this country. I cannot remember any coeducation[al] schools in my boyhood, except perhaps a few kindergartens. It is a fact that people in southern climates mature much faster sexually. Sex is an ever-present force in everyone’s life. I think it goes to the very basis of the integration question.

Sidney Rheinstein, Letter to the Editor, *Integration Without Coeducation*, N.Y. TIMES, Aug. 30, 1958, at 14. See also D.M. Gancher, Letter to the Editor, *For Dividing Sexes in Schools*, N.Y. TIMES, Jan. 27, 1959, at 32 (arguing that “the educational problem in the South and elsewhere may be largely and more beneficially disposed of by simply resorting to segregation by sex instead of color.”); D.M. Gancher, Letter to the Editor, *Segregation by Sex*, N.Y. TIMES, June 13, 1954, at SM6 (similar).

50. Alden, *supra* note 32, at 55; United Press International, *Segregation by Sex: Florida School Bill Seeks to Bar Racial Intermarriage*, N.Y. TIMES, Apr. 22, 1959, at 18; Associated Press, *Segregation by Sex Voted for Florida*, CHI. DAILY TRIB., May 27, 1959, at A6 (“The idea, said Rep. Jack Inman of Orlando, is to provide a means of heading off any sex problems which might arise in the event of race mixing in the schools.”).

51. Arthur Krock, *In the Nation: ‘Gradual’ in the Frame of History: II*, N.Y. TIMES, Mar. 27, 1956, at 34.

52. *Id.* Krock continued:

These Southerners oppose, and fear with the deepest emotions of which human beings are capable, amalgamation of the Caucasian and African races. Though certain of their ancestors were responsible for the infusion of white blood in the race enchained by slavery, this has only intensified their conviction that the anthropological consequences of this interbreeding is the lowering of both racial strains.

Id. Robert Alden also wrote in the *New York Times*,

The South is beginning to experiment with a legal type of segregation, based on gender, in an effort to make racial integration of the schools more acceptable. Much of the South’s worry about integration is based on a dislike of the intermingling of the sexes of Negro and white students. Therefore some educators and other students of the desegregation problem have decided that the solution might lie in first segregating the sexes in the schools.

Alden, *supra* note 32, at 55. See also John H. Lever, Letter to the Editor, *Segregation by Sexes*, N.Y. TIMES, Apr. 4, 1956, at 28 (endorsing Krock’s suggestion of sex segregation as a solution).

School Bill Seeks to Bar Racial Intermarriage.”⁵³ The sexual anxiety motivating sex segregation proposals was no secret—in fact, proponents invariably cited white Southerners’ fears about race-mixing as the primary rationale for separating students by sex.

Over the next several years, sex segregation continued to intrigue Southern legislators, and, especially, officials in the relatively few school districts under orders to racially desegregate. In 1959, segregationists in the Virginia House of Delegates proposed bills that would mandate the permanent discharge of any teacher who allowed coeducational classrooms,⁵⁴ or, alternatively, would require sex segregation in all public schools.⁵⁵ They apparently were heeding Governor J. Lindsay Almond’s earlier warning that a “livid stench of sadism, sex immorality and juvenile pregnancy” was “infesting the mixed schools.”⁵⁶ These extremist approaches did not win legislative approval, in large measure because Almond eventually retreated from the massive resistance agenda. Instead, sex segregation became a moderate alternative to the drastic measures taken by school districts like Prince Edward County, which closed its public schools for four years rather than desegregate. For instance, the Charlottesville schools initiated a sex separation “experiment” for the 1959-60 school year, and other districts in Virginia would later follow suit.⁵⁷ In 1960, several prominent Atlantans and a Fulton County, Georgia grand jury charged with studying the racial desegregation problem recommended that Atlanta reestablish sex segregation in its high schools, a policy the city had abandoned in 1947.⁵⁸

For some states and localities, sex segregation was more a desperate last resort than a carefully considered policy. Two years after the Little Rock school crisis, Arkansas Governor Orval Faubus attempted, unsuccessfully,

53. United Press International, *Segregation by Sex*, *supra* note 50, at 18.

54. Homer Bigart, *Virginia Passes Key School Bills: Almond's Plan for Easing Integration is Approved – Extremists Active*, N.Y. TIMES, Feb. 1, 1959, at 48.

55. Robert E. Baker, *Virginia's Die-Hards Agree to Vote on Bills*, WASH. POST, Jan. 31, 1959, at A1.

56. Homer Bigart, *Almond to Fight for Segregation: Governor Calls on Virginians to Support Him Despite Court's Adverse Ruling*, N.Y. TIMES, Jan. 21, 1959, at 16. For fascinating explorations of white Southern resistance to desegregation through state-level legislative initiatives relating to sexuality, family, and public benefits, see Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399 (1997); and Anders Walker, *The Ghost of Jim Crow: Law, Culture, and the Subversion of Civil Rights, 1954-1965* (2004) (unpublished Ph.D. dissertation, Yale University) (on file with Sterling Memorial Library, Manuscripts and Archives, Yale University).

57. Associated Press, *Schools Planning Sex Segregation: Charlottesville Will Separate Boys and Girls as Racial Integration Begins*, N.Y. TIMES, Jul. 10, 1959, at 8; see also Arthur Krock, *The Choices that Remain for Virginia*, N.Y. TIMES, Jan. 20, 1959, at 34 (suggesting sex segregation as an option).

58. *Georgia: Propose Separate Schools for Atlanta's Girls, Boys*, SOUTHERN SCHOOL NEWS, Aug. 1960, at 10; *'Don't Mix Sexes'—Atlanta*, CHICAGO DEFENDER, July 13, 1960, at A23. Such experiments were endorsed heartily by the *Christian Science Monitor*, which had been one of the first publications to editorialize in favor of sex segregation in the wake of *Brown* and continued to promote the idea throughout the 1950s. See, e.g., Editorial, *Straws in the Wind*, CHRISTIAN SCI. MONITOR, Jul. 22, 1959, at 16.

to convince that city's school board to adopt sex segregation as part of its racial desegregation plan.⁵⁹ In New Orleans, where opposition to school desegregation was characterized not only by vehemence, but also by vulgarity and violence, embattled school officials announced in 1960 that any racial desegregation in public schools would be accompanied by the segregation of classrooms by sex.⁶⁰ When a 1964 Fifth Circuit court order forced Mississippi to face the prospect of actual school desegregation after a decade of foot-dragging, a group of legislators proposed a bill authorizing school boards "to provide . . . for the separation of students according to sex, separately by classrooms or schools, when such board . . . determines such separation will promote or preserve the public peace, order, or tranquility of the school district, or the health, morals, or education of the students."⁶¹ As it turned out, it would be several more years before racial desegregation became a reality in Mississippi,⁶² but the New Orleans sex segregation idea spread to its suburbs and to other Louisiana parishes forced to racially desegregate in the mid-1960s.⁶³ For states and localities that succeeded in postponing desegregation, sex segregation remained until 1969 a hypothetical "safeguard" to be "throw[n] up when and if all other means to prevent integration are exhausted."⁶⁴

B. "Not Even the Present Court Can Call It Unconstitutional": The Presumed Legitimacy of Sex Segregation

Fueling the post-*Brown* sex separation renaissance was the pervasive perception that the constitutional encumbrances placed upon racial segregation were inapplicable to sex separation. Though the legality of racial segregation had come under escalating attack since the 1930s, and coeducation increasingly pervaded American schools, sex separation's constitutional pedigree remained unblemished. As Mitchell Rawson put it in 1954, there was "one form of segregation which is perfectly legal This is segregation of the sexes. Not even the present court can call it

59. *Faubus Urges Board to Segregate Two Schools*, WASH. POST, Jul. 29, 1959, at B8; *Segregation Effort Seen at Little Rock*, WASH. POST, Aug. 17, 1959, at B7.

60. *Louisiana: Governor Calls Special Session of Legislature*, SOUTHERN SCHOOL NEWS, Nov. 1960, at 1, 14. Superintendent James F. Redmond, under fire for attempting to cooperate with Judge Wright's desegregation order, hoped that the sex segregation policy would "tone down public reaction." *Id.* Redmond emphasized that the sex separation would apply in all school activities, "on the playground as well as in the classroom," and predicted that "eventually, most of [the] public school system would be operating on a noncoeducational basis." *Mixed Classes' Separation by Sex Scheduled*, NEW ORLEANS TIMES-PICAYUNE, Oct. 13, 1960, at 1; see also *In Mixed Classes: N.O. Schools Plan Separation by Sex*, NEW PITTSBURGH COURIER, Oct. 22, 1960, at 9.

61. *Legislator Proposes Law to Authorize Segregation by Sex*, SOUTHERN SCHOOL NEWS, Mar. 1964, at 11.

62. For more on the struggle over school desegregation in Mississippi, see BOLTON, *supra* note 29.

63. For more, see *infra* Parts II and III.

64. United Press International, *Desperation Move*, CHI. DEFENDER, Mar. 18, 1961, at 2 (quoting Alabama state legislator Alonzo Shumate).

unconstitutional.”⁶⁵ Similarly, Senator Bingham harkened back to nineteenth-century traditions of sex segregation in his letter to Governor Byrnes, asserting confidently: “No one could claim *that* was unconstitutional.”⁶⁶ When federal Judge J. Skelly Wright invalidated dozens of anti-desegregation measures passed by the Louisiana legislature in 1960, no one suggested that the segregation of students by sex should fall under his constitutional ax.⁶⁷ Krock perceived that *Brown’s* “badge of inferiority” argument might extend to sex segregation, noting that, “The Supreme Court conceivably might outlaw [sex separation] on its 1954 reasoning that (since its motive would be obvious) this arrangement also would ‘generate a feeling of inferiority [among Negroes] . . . in many ways unlikely ever to be undone.””⁶⁸ But Krock’s acknowledgement that sex separation might violate equal protection guarantees was highly unusual.

If recognition that sex segregation might pose a constitutional race discrimination problem was rare, the notion that it could constitute sex discrimination seemed even more far-fetched. To be sure, single-sex institutions were not immune from constitutional challenge in the 1950s. Some women’s rights advocates saw parallels between the exclusion of women and the exclusion of African Americans from institutions of higher education. The African American attorney Pauli Murray, who had made just such an argument in her unsuccessful bid to attend Harvard Law School in 1944, saw a 1958 suit seeking to overturn the bar on admitting women to Texas Agricultural and Mechanical (A & M) University as an opportunity to renew women’s legal quest for equal educational opportunity.⁶⁹ ACLU attorney Rowland Watts viewed the Texas case as a chance “to build up a ‘sociological’ record—insofar as time and our research facilities permit—comparable to that done in the racial segregation cases.”⁷⁰ John Barron, who argued the Texas A & M challenge before the state’s highest court, hoped that the women’s lawsuit

65. Mitchell Rawson, Letter to the Editor, *Segregation by Sexes*, N.Y. TIMES, Dec. 2, 1954, at 33.

66. *Pupil Separation By Sex Suggested: Ex-Senator Bingham Writes Byrnes This Would Help Solve Segregation Woes*, N.Y. TIMES, Jan. 20, 1955, at 33 (emphasis added).

67. See text accompanying *supra* note 36.

68. Krock, *supra* note 57, at 34 (quoting *Brown v. Board of Educ.*, 347 U.S. 483 (1954)). See also Brooks Hays, *A Southern Moderate Predicts Victory*, N.Y. TIMES, Jan. 1, 1959, at SM17 (reporting view that a recent Alabama court ruling “opens for the most difficult age group, the high schoolers, the perfectly valid possibility of segregation by sex”).

69. Presentation by Pauli Murray to the President’s Commission on the Status of Women (1962) (transcript on file with Schlesinger Library, Radcliffe Institute, Harvard University, Pauli Murray Papers, Box 49, Folder 885). On Murray’s attempt to gain admission to Harvard Law School, see REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS (J. Clay Smith, Jr. ed., 1998).

70. Letter from Rowland Watts, Staff Attorney, American Civil Liberties Union (“ACLU”), to John M. Barron (attorney for Bristol, et al), June 25, 1959 (on file with Mudd Library, Princeton University, American Civil Liberties Union [hereinafter “ACLU”] Records, Box 1142, Folder 22). National Woman’s Party officials, some of whom were less than friendly to the cause of racial desegregation, nevertheless saw in the Texas case a golden opportunity to publicize the need for an Equal Rights Amendment.

would, on the one hand, evade the “explosive ingredients” of the sensitive race issue, and on the other, facilitate challenges to sex separation as a tool of racial desegregation. In a letter to Watts in July 1959, Barron expressed optimism that “The fact that many—and increasing numbers—of school boards are using and are going to use segregation by sex to confute the segregation decisions, should cause the Court to see that this is a serious and important issue with far-reaching results.”⁷¹ Publicly, Barron could not be so candid; he claimed in court to dislike the *Brown* decision, but argued that if “separate but equal” was illegal in the context of racial segregation, it must also be illegal for the sexes.⁷²

But the outcome of the Texas A&M case did not bode well for those who would challenge sex segregation as “inherently unequal.” In *Heaton v. Bristol*, Judge W. T. McDonald of the Brazos County District Court, a Texas A&M graduate himself, found that “as a matter of law separate but equal facilities are inherently unequal as applied to males and females, and as a matter of law any attempt at classification of males and females for educational purposes at the [university] is irrational and immaterial to the educational objectives sought, and does violence” to both the Texas and United States Constitutions.⁷³ However, the Texas Court of Civil Appeals overruled McDonald,⁷⁴ and the U.S. Supreme Court declined to hear the women’s petition.⁷⁵ Equal Rights Amendment proponent Alma Lutz cited the *Bristol* decision as evidence of the need for constitutional change. “[S]egregation by sex,” she argued, “is as much out of line in a democracy as segregation by color, race, or religion.”⁷⁶ The Texas A&M case, of course, concerned the outright exclusion of women, rather than the separation of the sexes, so the Supreme Court’s denial of the women’s appeal clearly signaled that even the pre-*Brown* precedents requiring the

71. Letter from John M. Barron, District Attorney, Brazos County, Bryan, Texas, to Rowland Watts, Staff Attorney, ACLU, July 14, 1959 (on file with Mudd Library, Princeton University, ACLU Records, MC #001, Box 1142, Folder 22). Barron also hoped that, as in the racial segregation cases, “A case at college or university level should be stronger than one at grade-school level, and the ‘ice’ should be broken more easily.” *Id.*

72. Bicknell Eubanks, *Texas Aggie Ramparts Dented*, CHRISTIAN SCI. MONITOR, Mar. 29, 1958, at 14.

73. Quoted in *Heaton v. Bristol*, 317 S.W.2d 86, 91 (Tex. Civ. App. 1958).

74. The Texas Court of Civil Appeals noted that Texas A&M was the only public institution of higher education in the state that did not admit women:

[W]e must view the system as a whole in order to ascertain whether there is discrimination between the sexes, the entire system must be viewed, and not a single institution standing alone. This record shows that the system does not discriminate but makes ample and substantially equal provision for the education of both sexes.

Id. at 99.

75. *Bristol*, 317 S.W.2d 86, appeal dismissed, cert. denied, 359 U.S. 230 (1959), petition for rehearing denied, 359 U.S. 999 (1959). Justice Douglas dissented from the denial of the petition for rehearing. *Id.* at 999.

76. Alma Lutz, Letter to the Editor, *A Woman is a Person*, CHRISTIAN SCI. MONITOR, Apr. 22, 1959, at 18.

admission of African Americans to all-white graduate and professional schools were inapplicable to women.⁷⁷

It would be another decade before any substantial legal challenges to sex segregation in school desegregation plans arose. Most likely, this delay reflected the paucity of actual desegregation in the first decade after *Brown*, as well as the civil rights movement's desire to focus on persuading the reluctant executive and judicial branches to enforce *Brown's* mandate in the face of legislative and popular resistance. If sex segregation was what it took to accomplish even token integration, perhaps few advocates of desegregation were inclined to oppose the tactic. Sex segregation may have seemed relatively innocuous when the alternatives on the table included school closing and white brutality. Prominent African American leaders like Atlanta University President Rufus Clement, the only black member of the Atlanta school board, apparently concluded that sex segregation was, at best, a useful tool, and at worst, a necessary evil. Clement told the *Washington Post* in 1959 that African Americans should accept segregation by sex if, as the newspaper put it, "such programs allay fears and do not bar entry to schools because of race."⁷⁸ The following year, Clement declared himself "not at all . . . opposed to separate high schools for boys and girls if it will ease the situation and permit us to keep our [public] schools."⁷⁹

The political and constitutional climate also supported reticence on the subject of sex and its relationship to school desegregation. Given the strong and oft-noted association of integrated schools with "amalgamation," and the almost universal public opposition to interracial marriage in 1950s America,⁸⁰ the Supreme Court assiduously sidestepped

77. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the state of Texas could not provide substantially equal legal education to African American students at a separate, segregated law school, and that the University of Texas law school must admit Heman Sweatt); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that admitting an African American student to a University of Oklahoma graduate program but requiring him to sit apart from white students in classrooms, libraries, and other school facilities violated equal protection).

The *Dallas Morning News* editorialized in 1959 that the only way to rationalize the courts' refusal to mandate the admission of women to Texas A&M on the grounds that the state provided adequate coeducational alternatives, was to permit states to provide racially integrated and segregated educational options. "If the court is consistent, which has never been proved, this decision is important to states that desire educational segregation at the will of the educated," the editors wrote. Editorial, *If the Court is Consistent*, DALLAS MORNING NEWS, Apr. 8, 1959 (Mudd Library, Princeton University, ACLU Records, MC #001, Box 1142, Folder 22).

78. Robert E. Baker, *Biracial School Plan Offered*, WASH. POST, May 10, 1959, at D19.

79. *Georgia: Propose Separate Schools*, *supra* note 58, at 10. Clement, the first-ever African American member of the Atlanta school board, had won election in 1953. African Americans in Little Rock apparently expressed similar views in a 1959 survey, conducted by Little Rock's Inter-Racial Emergency Committee, which included a question regarding sex separation as a compromise means of achieving racial integration. The *Tri-State Defender* reported that "the rank-and-file Negro in the city was willing to compromise on the means to achieve integration in the city," and that "Negro teachers were said to have favored all of the [compromise] provisions by slight to overwhelming margins." *Little Rock 'Mob Leader' Issues Report*, TRI-STATE DEFENDER (Memphis, Tenn.), Feb. 28, 1959, at 1.

80. A 1958 Gallup poll found that only one percent of white Southerners and five percent of non-Southern whites approved of marriages between blacks and whites. ROMANO, *supra* note 27, at 45.

any ruling on the constitutionality of laws restricting interracial intimacy until a decade after *Brown*. The Justices engaged in procedural gymnastics to avoid reaching the merits in *Naim v. Naim*, a challenge to Virginia's anti-miscegenation law that reached the Court in 1955.⁸¹ As Michael Klarman explains, "To strike down antimiscegenation laws so soon after *Brown* risked appearing to validate [the] suspicions" of those who "charged that the real goal of the NAACP's school desegregation campaign was 'to open the bedroom doors of our white women to the Negro men' and 'to mongrelize the white race.'"⁸² It was not until 1964 that the Court struck down a law prohibiting interracial cohabitation, in *McLaughlin v. Florida*,⁸³ and only in 1967 did laws prohibiting interracial marriage meet their demise in *Loving v. Virginia*.⁸⁴ Until the mid-1960s, it was far from clear that government action restricting interracial sexual relationships fell into the category of race discrimination prohibited by the Fourteenth Amendment.

In sum, before the late 1960s, virtually no one perceived sex segregation as a problem of sex discrimination, and few even raised objections on race discrimination grounds. Very little actual school desegregation occurred in the decade after *Brown*, and advocates of integration apparently felt that sex segregation was a small price to pay for the incremental gains they were able to make in a smattering of Southern school districts. Objecting to sex segregation also could play into the hands of segregationists who insisted that "mongrelization" was the object and inevitable result of school desegregation. Nor did a legal vocabulary exist with which to describe sex segregation as sex discrimination. Those who dared to challenge single-sex public education did so in the context of post-secondary institutions that did not provide any alternative to female students, and they were unsuccessful. As the next Part describes, however, when racial desegregation finally gained momentum at the end of the 1960s, litigants and judges began to characterize sex segregation as, at least in some cases, a form of race discrimination.

II. "RACIAL SEGREGATION BY SUBTERFUGE": SEX SEGREGATION AS RACE DISCRIMINATION

Despite the enormous political and cultural changes that occurred between May 1954 and May 1968, very little effective racial

81. *Naim v. Naim*, 197 Va. 80 (1955), *vacated and remanded*, 350 U.S. 891 (1955), *reinstated and aff'd*, 197 Va. 734 (1956), *appeal dismissed*, 350 U.S. 985 (1956).

82. Klarman, *supra* note 38, at 321. See also Dailey, *supra* note 27, at 159 ("Everyone connected with the school cases that became known collectively as *Brown v. Board of Education* understood how vital it was that they not be linked with sex."). For a description of internal Court deliberations on *Naim*, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 62-67 (1979).

83. 379 U.S. 184 (1964).

84. 388 U.S. 1 (1967).

desegregation took place between *Brown* and the Supreme Court's ruling in *Green v. New Kent County School Board*.⁸⁵ When confronted with the reality of integration in 1969-70, a number of Southern school districts turned to sex segregation. Judges often embraced or tolerated these proposals as a means of easing the transition to racial integration. For many African American communities, however, sex segregation added insult to injury, and their protests prompted courts to scrutinize the motivations behind sex segregation more closely. The Fifth Circuit's standard, which required judges to determine whether sex separation was motivated by "racial discrimination" or by legitimate "educational purposes," marked a shift in Jane Crow discourse. This inquiry prompted many school districts to invent race-neutral explanations for sex segregation, including sex differences in curricular, vocational, and athletic interests; the benefits of single-sex education to boys; the economic advantages of avoiding the "needless duplication" of facilities; and the prevention of "disciplinary" and "sex problems." Still, though race discrimination had become a primary concern, no one attacked sex segregation as sex discrimination.

A. "Educational Decisions Are For the School Board Alone": Revitalizing the Sex Separation Solution

Only token desegregation had occurred in formerly all-white schools under "freedom-of-choice" plans, and hardly any white children attended historically black schools in 1968. The Supreme Court's decision in *Green* was the epitaph for this particular incarnation of foot-dragging. *Green* imposed upon school boards "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch,"⁸⁶ In the decision's wake, the Fifth Circuit Court of Appeals instituted expedited procedures for school desegregation cases that resulted in a flood of court orders: between December 1969 and October 1970, the court handed down no fewer than 166 opinions involving 89 different school districts.⁸⁷

85. 391 U.S. 430 (1968).

86. *Id.* at 437-38.

87. FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 469 (1978). Ironically, this sudden acceleration of desegregation was driven in part by the impending trend toward conservatism in the executive branch. Concerned that the Nixon White House's commitment to school desegregation would not match their own, officials in the Departments of Justice and Health, Education and Welfare (HEW) made sure to file *Green*-inspired desegregation suits throughout the South before Johnson left office.

Although Nixon appointed a HEW secretary with a strong record on civil rights, Robert Finch, Southern conservatives led by South Carolina Senator Strom Thurmond besieged Finch's department and the Department of Justice almost immediately. As historians Frank T. Read and Lucy S. McGough recount, the ultimate result of their battle was an unprecedented split between the Justice Department and the NAACP Legal Defense Fund, which had for many years counted federal government lawyers as crucial allies. Under tremendous pressure, Finch had issued a directive interpreted across the South as a reprieve for recalcitrant school districts, countenancing delays that the Supreme Court would

Meanwhile, the Department of Health, Education, and Welfare (HEW) initiated a new policy whereby staffers from the Office of Education would assist school districts in developing desegregation plans, on the theory that local consultation would make for more expeditious and mutually satisfactory results. As it turned out, many school districts showed little interest in seeking the advice of HEW's education experts. Often, HEW's recommendations were met with school board counterproposals characterized by varying levels of evasion, circumvention, and delay. Sometimes, those counterproposals included sex segregation schemes.

Just as they had before court-ordered desegregation's expanded mandate, post-*Green* sex separation plans took a variety of forms. Some school boards proposed sex segregation as a temporary measure designed to ease white parents into the frightening world of integration; others viewed sex segregation as a permanent solution to the evils of interracial contact. In some schemes, classrooms were segregated by sex. More commonly, at least in the cases challenged in court, entire school campuses would be designated all-male or all-female. In many of the school districts that desegregated by race and segregated by sex prior to 1968, such as Jefferson and St. Bernard Parishes in Louisiana, a majority of the student population was white. After 1968, sex segregation appealed particularly to school boards in districts where black students constituted a majority, or close to it, or where African Americans were concentrated in a particular geographic area.⁸⁸ In Concordia Parish, Louisiana, for instance, where the total population of school-age children was approximately fifty-five percent white and forty-five percent black, a higher concentration of African American students lived in one particular area of the district. Citing the "exceptional" nature of the predominantly black schools in that area, District Court Judge Ben Dawkins, Jr. approved a multi-step desegregation plan. In the first stage, a cohort of African

explicitly prohibit in the Mississippi case *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, in October 1969. See READ & MCGOUGH, *supra*, at 485-88.

88. On the differences between majority-white and majority-black school districts, see BOLTON, *supra* note 29, at 131; and Charles C. Bolton, *The Last Stand of Massive Resistance: Mississippi Public School Integration, 1970*, 61 J. OF MISS. HIST. 329, 341 (1999) ("Fewer whites fled from public schools in white-majority districts, not only because white fears of integrated schools were not as pronounced in places where they had numerical superiority, but also because whites in these areas generally had fewer resources to support a private system of education."). As Michael Klarman explains, "Ardent segregationists tended to come from rural areas with large black populations or from working-class urban neighborhoods without rigid residential segregation." Klarman, *supra* note 38, at 21, 24; see also John A. Kirk, *Massive Resistance and Minimum Compliance: The Origins of the 1957 Little Rock School Crisis and the Failure of School Desegregation in the South*, in MASSIVE RESISTANCE, *supra* note 27, at 76, 77 ("Different parts of the South offered different levels of resistance to school desegregation, and that resistance often developed more quickly and determinedly in places that had larger black populations, where whites felt more threatened by racial change."). Adam Fairclough argues, however, that in Louisiana, "Support for massive resistance did not always increase in proportion to the black population." Adam Fairclough, *A Political Coup d'Etat?: How the Enemies of Earl Long Overwhelmed Racial Moderation in Louisiana*, in MASSIVE RESISTANCE, *supra* note 27, at 56, 57.

American students would be transferred to formerly all-white schools, or schools in which some token desegregation had already occurred; then, in the second stage, white students would begin to integrate formerly all-black schools. It was in this second pivotal phase that sex separation would occur, in grades seven and above.⁸⁹ In Taylor and Baker Counties, Georgia, African Americans constituted just under and just over fifty percent, respectively, of the population. These small, rural communities had just one secondary school for each race; in those districts boys would attend the formerly black school, and girls would use the formerly white campus.⁹⁰ Similarly, in Amite County, Mississippi, where African Americans constituted approximately sixty percent of the district's seven thousand students and where schools were few in number, white students would have to attend all-black schools immediately if desegregation was to be practicable. Coincident with racial desegregation, two of the district's secondary schools would become all-male, and two all-female.⁹¹

District court judges responded to sex segregation proposals in a variety of ways in the early and sometimes chaotic months of large-scale desegregation. Some, like Judge Dawkins, approved the separation of boys and girls with little commentary, either deferring wordlessly to the school district's assessment of necessity or mentioning sex segregation matter-of-factly as an unexceptional element of the desegregation plan.⁹² Others dismissed plaintiffs' objections to the sex separation, deferring to the local school boards' judgment that such an arrangement was desirable.

89. Opinion and Order, *Smith v. Concordia Parish Sch. Bd.* No. 11577 (W.D. La. Aug. 1, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349). One year later, however, Judge Dawkins rejected Concordia Parish's sex separation scheme. See 2 RACE REL. L. SURV. 174 (Jan. 1971). Other Louisiana districts maintained sex segregated schools well into the 1970s. St. James Parish, Louisiana, for example, retained the sex segregation scheme instituted in 1969 until the 1974-75 school year. See Order, *Banks v. St. James Parish Sch. Bd.*, No. 16173-C (E.D. La. June 10, 1969) (describing sex segregation plan), and Order, *Banks v. St. James Parish Sch. Bd.*, No. 16173 (E.D. La. June 25, 1974) (describing plan for reinstating coeducation) (NARA, S.W. Reg. Div., RG 21, U.S. Dist. Ct. Eastern Dist. La.—New Orleans Civil Cases, Deseg. Cases). For an in-depth discussion of one long-term Louisiana sex segregation plan, see *infra* Part III.B.

90. Stanford Maxwell Brown, *Equalization, Freedom of Choice, and Sex Segregation: School Desegregation in Taylor and Baker Counties* (1994) (unpublished M.A. thesis, University of Georgia) (on file with the Hargrett Rare Book and Manuscript Library, University of Georgia).

91. Logistics sometimes overcame school boards' desires to institute sex segregation; for instance, Little Rock rejected a sex separation proposal in part because the district contained an odd number of high schools.

92. Judge Dawkins did not discuss the merits of sex segregation specifically in his initial Concordia Parish order. Tacitly approving the delay and the sex segregation aspects of the school district's plan, the judge rejected HEW's proposal for Concordia Parish as "unworkable and impractical. If adopted," Dawkins declared, "there is grave danger that it would create an all Negro, or substantially all Negro, public school system and thwart the objectives enumerated in the desegregation cases." Opinion and Order at 3, *Smith*, No. 11577 (W.D. La. Aug. 1, 1969).

Judge Dawkins had never been a full-throated supporter of desegregation. According to Liva Baker, he admitted in one court hearing that his preferred legal regime was "*Plessy v. Ferguson*, separate but equal." BAKER, *supra* note 14, at 263. Adam Fairclough notes, however, that while he applauded desegregation delays because he worried about white flight, Judge Dawkins was not an extreme segregationist. FAIRCLOUGH, *supra* note 23, at 311, 442. Indeed, Dawkins eventually rejected Concordia Parish's sex segregation scheme. See *infra* note 136.

For instance, in a pair of 1969 Louisiana cases, Judge Alvin Rubin upheld several sex-segregated school assignments over plaintiffs' complaints that the plans were motivated by racial hostility.⁹³ Noting that many school districts throughout the country had long maintained separate schools for boys and girls despite the pervasiveness of coeducation, Judge Rubin emphasized that "*educational decisions are for the school board alone.*"⁹⁴ Since the school board was "convinced that in this transitional period separate education based on sex would provide the atmosphere most conducive for learning in these schools," separation was "not a denial of equal protection of the law."⁹⁵ District Court Judge William Keady, considering a sex separation plan in Carroll County, Mississippi, remarked that "the philosophy of teaching young people on a basis of separation by sex is respectable and has behind it a certain wisdom of the ages," noting also that no federal court had found the practice objectionable.⁹⁶ To jurists with varying levels of enthusiasm for racial desegregation, then, sex separation seemed a useful desegregation technique and offended no constitutional principle.

B. "Some Feeling of Inferiority and a Vivid Imagination": The Racial Motivation Standard

Under increasing pressure from African American communities and, sometimes, the federal government, courts soon began to shift the burden of proof in sex segregation cases to school districts. At least in theory, the

93. "Plaintiffs contend that this proposal is racially motivated, and point out that separate education on the basis of sex was not considered until the schools were ordered to desegregate." *Moore v. Tangipahoa Parish Sch. Bd.*, 304 F. Supp. 244, 249 (E.D. La. 1969).

94. *Id.* (emphasis added).

95. *Id.*; see also 1 RACE REL. L. SURV. 163-64 (Nov. 1969) (describing Judge Rubin's order that St. Tammany Parish implement a "plan for total desegregation" and noting that "[a]pproval was given to segregating six of the schools by sex, this being a 'transitory measure designed to ease the conversion to a unitary school system'"); 1 RACE REL. L. SURV. 205-06 (Jan. 1970) (describing Judge Rubin's finding that the Tangipahoa Parish schools were "still largely segregated," and his conviction that "the law no longer allows deliberate speed in desegregation," but noting that "assignment of students to different schools on the basis of sex, during a transitional period, was regarded [by Judge Rubin] as a legitimate educational experiment not denying equal protection of the law to any student.").

Judge Rubin, a Johnson appointee whom President Carter would later elevate to the Fifth Circuit, earned a reputation as an eminently fair and compassionate judge sympathetic to the rights of African Americans and women. In 1973, he ruled in *Healy v. Edwards* that Louisiana's system of exempting women from jury service violated the equal protection clause by depriving women of equal citizenship status. The Supreme Court later agreed. Ruth Bader Ginsburg, who argued the *Healy* case, later paid tribute to Judge Rubin as a paragon of good judging. See Ruth Bader Ginsburg, *Judge Robert A. Ainsworth, Jr. Memorial Lecture: Four Louisiana Giants in the Law*, 48 LOY. L. REV. 253 (2002).

96. *United States v. Carroll County, No. 6541K* (N.D. Miss. 1969), *quoted in* Order, *United States v. Lincoln County Bd. of Educ.*, Nos. 1400 and 1420 (S.D. Ga. Apr. 27, 1970) (Library of Congress, Records of the NAACP, V:2819, Folder: Schools, Georgia, Legal Cases, 1970-1978). See also 1 RACE REL. L. SURV. 112 (Sept. 1969) ("On May 19 Judge Keady ordered the Carroll County school board to implement a two-year desegregation program, which will . . . separate the students on the basis of sex in all grades."); *United States v. Richmond County Sch. Bd.* (E.D. Va. June 10, 1970), *discussed in* 2 RACE REL. L. SURV. 90 (Sept. 1970) (noting that sex separation was a practice long followed in other areas).

Fifth Circuit required school boards to show that sex segregation was not merely a new instrument of racial discrimination and humiliation, but rather a product of legitimate educational purposes.⁹⁷ Initially, many school districts responded by arguing that sex separation had its roots not in discriminatory animus but in well-intentioned pragmatism designed to ease the transition to racially integrated education and prevent white abandonment of the public schools. Ultimately, though, the racial motivation standard encouraged local school officials to emphasize the purported educational benefits of sex separation rather than focusing on its racial context.

By the end of 1969, the Fifth Circuit had established a vague but uniform standard for addressing sex segregation schemes proposed and implemented by school districts in their racial desegregation plans. In December, a panel of that court declared racially discriminatory intent to be the determining factor, calling on trial courts to distinguish between plans motivated by “racial discrimination” and those based on “educational purposes,”⁹⁸ a standard the circuit reaffirmed in 1972.⁹⁹ Defending sex separation plans against charges of racial motivation could be a tricky business for school districts where white attitudes toward desegregation ran the gamut from profound reluctance to violent intransigence. But the tremendous attitudinal and logistical difficulties associated with desegregation put a premium on proposals that promised a racially unitary system, regardless of the plans’ other characteristics. For many courts, achieving this objective outweighed any countervailing concerns about sex separation: judges frequently “pretermitted” the question of sex separation pending the establishment of a racially unitary system,¹⁰⁰ and sometimes the federal government supported such

97. The Fifth Circuit was the only circuit to establish, in a published opinion, a uniform standard for addressing sex separation schemes; however, such plans did appear in other circuits, where judges sometimes inquired into their purpose and effect. On the Fourth Circuit’s treatment of sex separation plans, see, for example, 2 RACE REL. L. SURVEY 50 (July 1970) (noting rejection by federal district Judge James R. Martin, Jr. of a Barnwell, South Carolina school district plan to separate students by sex on the ground that “defendants had not met their burden of proving that the plan was free from racial purpose or effect”); and *United States v. Richmond County Sch. Bd.* (E.D. Va. June 10, 1970), discussed in 2 RACE REL. L. SURV. 90 (Sept. 1970) (ruling that evidence did not show illegitimate racial motive in sex separation case).

98. *United States v. Amite County*, No. 28030 (5th Cir. Dec. 19, 1969) (“[I]s racial discrimination the motivation for the plan or does it have its basis in educational purposes?”).

99. *United States v. Georgia*, 466 F.2d 197, 200 (5th Cir. 1972) (holding that school boards had “a duty where sex separation is maintained in the school system to provide proof that the plan was devised and is to be promulgated for educational purposes only; therefore, the Board must show that the plan was implemented for educational rather than racially discriminatory purposes.”). The court was overruling a three-judge district court, which had previously ruled that “the doctrine of equal protection applies to racial content or effect, and not to the motives or purposes behind the acts of the state.” *United States v. Georgia*, No. 71-2563 (N.D. Ga. July 16, 1971), quoted in 2 RACE REL. L. SURV. 133 (Nov. 1971).

100. See, e.g., Motion for New Plan of Pupil Assignment, *United States v. Hinds County Sch. Bd. and Amite County Sch. Dist.*, Nos. 28030 & 28042 (5th Cir. Oct. 25, 1973) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4167, 28030 & 28042, Sept. 1972-1973); *Williams v. Iberville*

postponements.¹⁰¹ Some courts implicitly placed the burden of proving racial hostility on those who objected to a school district's sex separation scheme. For instance, in approving six Georgia plans that involved some sex segregation, a federal judicial panel focused on the lack of evidence that separate schools for boys and girls produced "any educationally unsound consequences or inequities resulting in racial discrimination."¹⁰²

Especially in the early months of court-ordered desegregation, school districts often relied on judges' sympathy for expedient measures designed to effectuate a smooth transition and avoid a white exodus from the public schools. Attorneys for Jane Crow school districts frequently insisted that the alternative was not coeducational biracial schools, but rather an all-black public school system, which, they alleged, the HEW proposals were certain to produce. Representing the Concordia Parish, Louisiana School Board, W.C. Falkenheiner urged a Fifth Circuit panel to

ask itself whether it is realistic to adopt a plan which would adversely affect the education of all children, both black and white, and whether it is realistic to adopt a plan which, in the opinion of those best in a position to know, has real prospects of converting the public school system to a substantially all black system.¹⁰³

Other sex segregation proponents had more apocalyptic visions, foreseeing the widespread abolition of public education if boys and girls of different races attended school together. Wilkinson County, Mississippi's school superintendent, Bernard Waites, signed an affidavit asserting that he had "absolutely no doubt that if the plans as formulated by HEW are put into effect, such plans will result in the abolishment of the Public Educational System in the County and create a state of chaos inasmuch as the County pupil ratio is approximately 22% White and 78% Negro students."¹⁰⁴ Similarly, the school board in neighboring Amite

Parish Sch. Bd., No. 28571 (5th Cir. Dec. 13, 1969) (per curiam) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4290, 28569-28571).

101. See, e.g., Brief for the United States, *Singleton v. Jackson Mun. Separate Sch. Dist.*, No. 2842 (5th Cir. [1969]) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 3775, 26285(pt.)-26290). ("We believe that, in the present state of the record this Court may wish to defer consideration of the issue until racial segregation has been eliminated in Concordia Parish.")

102. Order, *Georgia*, No. 71-2563 (N.D. Ga. Apr. 21, 1970), *quoted in* Brown, *supra* note 90, at 106 n.11.

103. Brief of Appellees at 4-5, *Smith v. Concordia Parish Sch. Bd.*, No. 28342 (5th Cir. Nov. 13, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349).

104. Exhibit "A" (Affidavit of Bernard Waites) (Aug. 14, 1969), appended to *Objections to H.E.W. Plans, United States v. Wilkinson County Bd. of Educ.*, No. 1160 (S.D. Miss.) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4163, Nov. 1969(pt.)-March 1970). Lawyers for the Wilkinson County, Mississippi school district also warned of a "mass exodus" of white teachers from county schools if immediate desegregation were pursued. *Objections to H.E.W. Plans, supra*, at 2; see also 2 RACE REL. L. SURV. 137 (Nov. 1970) (noting that "after the [desegregation] plan was put into effect all of the white students and all but 6 of the white teachers withdrew from the public school system," and that the school board petitioned the district court for permission to close the high school and send remaining students to the school serving grades 1-9).

County declared in a motion before the Fifth Circuit, “[S]eparation of the sexes is absolutely necessary if Defendants-Appellees are to maintain a public education system within their school district.”¹⁰⁵

These dire predictions reflected the continued vehemence of white resistance to integrated schools, even though the abolition of public education remained highly unlikely.¹⁰⁶ Across the Deep South, “seg academies”—private schools serving white students—had appeared in the 1950s and proliferated in the wake of court-ordered desegregation at the close of the 1960s.¹⁰⁷ In Mississippi, state superintendent of schools Garvis Johnson appealed to white citizens to “help us preserve our public education,” but his pleas placed hardly a dent in the “mass matriculation” of white children at private schools in 1969-70.¹⁰⁸ In early 1970, a Mississippi state legislator could credibly, if crudely, declare, “What we’re going to wind up with eventually is private schools for the white kids and a state-subsidized system for the niggers.”¹⁰⁹ White business and community leaders fretted that without affordable, segregated private schools, poorer white parents would keep their children at home or worse, resort to violence.¹¹⁰ Some wondered aloud whether public education had any future in Mississippi, given the recent repeal of the compulsory school

105. Motion of Defendants-Appellees to Amend Desegregation Order, *United States v. Amite County Sch. Dist.*, Nos. 28030 & 28042 (5th Cir. Nov. 10, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4163, Nov. 1969 (pt.)-March 1970).

106. While most white Southerners supported segregation, a majority preferred token integration to school closings, even in the late 1950s. See Klarman, *supra* note 38, at 29. Of course, school closings were not unheard of: Prince Edward County, Virginia had closed its public schools when faced with court-ordered desegregation in 1959, leaving most African American children in the county without formal education for more than four years. J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 98-99 (1979). Most white students were able to attend private schools founded to maintain educational segregation. *Id.* But massive resistance met its demise in large part because Southerners were not willing to sacrifice public education at the altar of de jure segregation. See Klarman, *supra* note 38, at 29. However, historian Charles Bolton has called Mississippi whites’ reaction to desegregation in the 1970s “the last stand of massive resistance.” See Bolton, *supra* note 88, at 329.

107. Between 1966 and 1970, the number of private schools in Mississippi climbed from 121 to 236, and the number of students attending private schools increased threefold. Much of the exodus occurred in black-majority districts. Bolton, *supra* note 88, at 341.

108. James T. Wooten, *U.S. Forms Panel for Mississippi: Agents to Help Transition to Integrated Schools*, N.Y. TIMES, Jan. 1, 1970, at 21. Rallies attended by thousands of white parents featured die-hard segregationists like former gubernatorial candidate and country-music singer Jimmy Swann, who campaigned for “private” segregated schools financed with state monies. *Id.* While Governor John Bell Williams counseled white Mississippians against violent resistance to desegregation, he supported the state legislature’s attempts to provide parents with private school vouchers, or, alternatively, to allow tax deductions for private school expenses. He also supported continued compensation for teachers who refused to comply with desegregation. *Id.* Charles Bolton argues that while Governor Williams supported the use of public funds for private schools, he “clearly saw private schools as a temporary solution. Along with most state political and business leaders, he recognized that abandoning the public schools permanently would damage the state’s continuing effort to attract industry to the state.” Bolton, *supra* note 88, at 340.

109. James T. Wooten, *Exodus Seen as Threat to the System on Eve of Integration Move*, N.Y. TIMES, Jan. 5, 1970, at 1.

110. *Id.* “These are the folks I’m worried about,” one white teacher from Canton told the *New York Times*. “They have no alternative except no school or integrated school—and they’re just the ones who might start trouble.” *Id.*

attendance law¹¹¹ and the massive withdrawal of funding from public schools in some districts.¹¹²

As in *Brown's* immediate wake, the true purpose of sex separation in the post-*Green* era was hardly in doubt. School officials, parents, and students in Jane Crow districts more or less freely admitted to reporters that the specter of "amalgamation" and its effect on white support for public education drove the demand for sex segregation. The *Wall Street Journal* reported in 1970 that "when pressed," school officials "explain[ed] their real motive [for sex separation]: To keep black boys from white girls: the fear of interracial dating has long haunted even moderate Southerners."¹¹³ In Taylor County, Georgia, "just about everyone concede[d] that the plan was really a palliative for white parents worried about [the] interracial dating and marriage that they saw coming from integration," the *Christian Science Monitor* noted in 1972.¹¹⁴

What was different about these new sex segregation schemes was that they were now susceptible to legal challenge. School boards had to deny in court that their sex segregation schemes were racially motivated, even as they acknowledged privately the plans' true impetus. The State of Georgia accomplished this feat of verbal gymnastics simply by insisting that there was no evidence of racial motivation behind the separation plans.¹¹⁵ Refuting the plaintiffs' contention that, in the School Board's words, its plan was "suspect simply because of the times and

111. *Id.*

112. Roy Reed, *Full Integration Worries and Angers Mississippi*, N.Y. TIMES, Nov. 24, 1969, at 1. In Louisiana, Governor John J. McKeithen fomented such speculation by suggesting publicly that the state legislature would henceforth refuse to appropriate funds to the school system. *Id.* McKeithen also predicted that integration would "bring civil disobedience by tens of thousands of our citizens." Roy Reed, *Pupil Integration Spurring in South*, N.Y. TIMES, Sept. 2, 1969, at 1.

During litigation, school districts regularly argued that their own plans constituted the only means of preventing complete white withdrawal from the public schools. *See, e.g.*, 1 RACE REL. L. SURV. 65 (July 1969) ("Once again, the threat of wholesale withdrawal from the public schools in which Negroes heavily predominate was declared [by the Fifth Circuit] not to be a justification for sustaining constitutionally unacceptable desegregation plans. . . ."); *id.* at 70 (noting an Arkansas school board's contention that "no feasible alternative to freedom of choice exists . . . because if any kind of compulsory integration plan were to be implemented, most of the white students would be withdrawn from the public schools to avoid attending schools in which Negroes are in the majority"); 1 RACE REL. L. SURV. 113 (Sept. 1969) (describing similar arguments in a Tennessee case); 1 RACE REL. L. SURV. 156 (Nov. 1969) (describing similar argument in a Virginia case).

113. Tom Herman, *Evasive Action: Schools in Deep South Slow Integration Tide with Subtler Tactics*, WALL ST. J., Oct. 15, 1970, at 1.

114. John Dillin, *To Integrate, Set Boys, Girls Apart?*, CHRISTIAN SCI. MONITOR, Apr. 8, 1972, at 1. Indeed, segregationist publications like *The Citizen* kept up the drumbeat against "race mixing" well into the 1970s. Private school teacher Bob Weems opined in 1972 that historically, the "emotional question,"

Would you want your daughter to marry a Negro? . . . has been the most effective single argument against the social intermingling of the races. . . . [I]n spite of attempted satire by integrationists it is still the best weapon in our arsenal, for it goes straight to the heart of the race problem.

Bob Weems, *Interracial Marriage, Etc.*, THE CITIZEN, Feb. 1972, at 4.

115. Brief of the State of Georgia, et al., *United States v. Georgia*, Nos. 71-2563 and 12972 (5th Cir. Sept. 16, 1971) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 6148, 71-2563-71-2569) (asserting a lack of racial motivation except perhaps for Taylor County plan).

circumstances under which it was adopted,” school officials in Concordia Parish, Louisiana contended that their ability to implement sex segregation prior to racial desegregation mandates had been constrained by court-ordered freedom-of-choice plans and by the lack of adequate facilities.¹¹⁶

Sex segregation proponents also questioned the racial motivation standard itself. At first they did so indirectly, arguing that regardless of intent, sex separation could not be discriminatory since it applied equally to both races. “If any parent or student, white or Negro, has some feeling of inferiority and such a vivid imagination,” attorneys for the Concordia Parish officials wrote, “the School Board should not be held accountable for it.”¹¹⁷ School boards mustered additional ammunition against the requirement that they prove the absence of racial motivation from the Supreme Court’s 1971 decision in *Palmer v. Thompson*.¹¹⁸ A closely divided Court had ruled in *Palmer* that the decision of Jackson, Mississippi to close its municipal pool rather than allow racially integrated swimming did not violate the equal protection clause. According to the attorney general of Georgia, *Palmer* thereby “laid to rest the erroneous notion that ‘motivation’ is a proper subject of judicial inquiry.”¹¹⁹ Georgia’s attorneys went one step further and attacked the racial motivation standard head on: “Even . . . assuming further that the separation by sex was ‘racially motivated,’ the proper response is so what! Most everything in public education is racially motivated today. This is what the federal courts require” by pushing districts to desegregate, the state’s brief declared.¹²⁰ “Is it not reasonable to assume that local school officials, faced with massive racial integration, *desiring that it work*, and

116. Brief of Appellees at 6, *Smith v. Concordia Parish School Board*, No. 28342 (5th Cir. Nov. 13, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349). Furthermore, the board’s brief argued, if racial motivation were at the root of the sex separation scheme, the district would have separated all boys and girls in the parish, not just those in two particular geographic areas. *Id.* at 7. The brief neglected to mention what District Court Judge Dawkins had emphasized in his decision approving the plan—namely, that these areas were the only ones in the parish where black students outnumbered whites by a substantial margin. Plaintiffs’ attorney Norman Chachkin wrote to Judge Charles Clark in December 1969 that the appeal in another pair of Louisiana cases “presents the serious issue of the constitutionality of imposing sex separation only upon that part of a Parish wherein Negro students outnumber white students.” Letter from Norman Chachkin, Attorney for Appellants, to Hon. Charles Clark, U.S. Circuit Judge, Dec. 9, 1969, Re: No. 28573—*Charles v. Ascension Parish School Bd.*, No. 28571—*Williams v. Iberville Parish School Bd.* (NARA, S.W. Reg. Div., Fifth Circuit, Case Files, Box 4291, 28572-28576).

117. Brief of Appellees at 8, *Smith*, No. 28342 (5th Cir. Nov. 13, 1969).

118. 403 U.S. 217 (1971).

119. Brief of the State of Georgia, et al., at 16, *Georgia*, Nos. 71-2563 and 12972 (5th Cir. Sept. 14, 1971) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 6148, 71:2563-71:2569). Justice Black’s opinion for the Court in *Palmer* included a fairly lengthy disquisition on the “pitfalls” of judicial inquiry into legislative motivation, beginning with the declaration that “no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.” *Palmer*, 403 U.S. at 224.

120. Brief of the State of Georgia, et al. at 17, *Georgia*, Nos. 71-2563 and 12972 (5th Cir. Sept. 14, 1971).

that meaningful public education be maintained, seize upon the device of separation by sex as a means of reducing disciplinary problems?"¹²¹

Opponents of sex separation scoffed at the school districts' attempts to deny invidious racial motivations. Plaintiffs in Concordia Parish, Louisiana pointed out that the school superintendent himself had testified before the trial court that "the coeducational system in effect in Concordia was educationally sound as long as schools are racially segregated." When, however, racial integration becomes inevitable, then sexual segregation suddenly is 'most educationally sound.'"¹²² Such testimony made "plain what must become obvious to black parents and their children" if the sex separation plan went into effect: "[T]o the school officials of Concordia, black boys are simply not good enough to be in schools with white girls, and black girls are simply not good enough to be in schools with white boys."¹²³ Under these circumstances, the plaintiffs' attorney, George Strickler, argued, the practice imposed a "badge of inferiority" similar to that endured under Jim Crow. Plaintiffs also contended that segregation denied members of the disadvantaged group the opportunity to "develop relationships with members of the dominant class."¹²⁴ When implemented solely to avoid the dreaded specter of interracial sexual contact, plaintiffs in Concordia Parish declared, sex separation did nothing more than "perpetuate racial segregation by subterfuge."¹²⁵ It was not enough, insisted lawyers for African American families in Georgia, "that assignments based upon sex do not produce unsound education or inequities resulting in racial discrimination."¹²⁶ Under such suspicious circumstances, "sex separation may be racial discrimination per se."¹²⁷

121. *Id.*

122. Brief of Appellants at 9, *Smith*, No. 28342 (5th Cir. Oct. 1, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349).

123. *Id.* at 10. It remains unclear to what extent concerns about relationships between white boys and black girls, as opposed to between black boys and white girls, underlay sex segregation. Given the history of white men's and boys' sexual exploitation of black women and girls, African American parents might have supported sex segregation as a means of reducing white access to their daughters, but I have not found any sources indicating that this concern outweighed their indignation at the racial insult of sex segregation. For more on the legal status of interracial intimacy between white men and black women, see Adrienne Davis, *Loving Against the Law: The History and Jurisprudence of Interracial Sex* (unpublished manuscript, on file with the author). Whites' opposition to interracial dating and marriage did not always specify the composition of the couples that concerned them, although when it did, black male/white female dyads always dominated anti-miscegenation rhetoric. For a historical perspective, see MARTHA HODES, *WHITE WOMEN/BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* (1997).

124. Brief of Appellants at 12, *Smith*, No. 28342 (5th Cir. Oct. 1, 1969).

125. *Id.* at 9.

126. Brief of Private Appellants at 3, *Georgia*, No. 71-2563 (5th Cir. Sept. 7, 1971) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 6148, 71-2563-71-2569).

127. *Id.*

Using the Supreme Court's recent decision in *Loving v. Virginia*,¹²⁸ plaintiffs and their lawyers also attempted to debunk the school districts' argument that sex separation could not be racially discriminatory since it affected both races equally. Quoting *Loving*, attorney Strickler noted that "the fact of equal application does not immunize the statute from the very heavy burden of justification" required of race-related statutes.¹²⁹ Strickler suggested that "the same rule should apply to facially non-racial classifications which are nonetheless racially motivated."¹³⁰ In one of several interventions by the federal government in sex segregation controversies, the United States similarly used *Loving* to rebut Georgia's contention that "equal application" immunized sex separation from constitutional challenge.¹³¹ "[T]he subtle implications of sex separation as a required factor of racial desegregation are not lost on black children," government lawyers concluded.¹³²

However compelling these legal arguments may have been, it was the testimony of African American citizens themselves that apparently convinced several courts to see sex separation as racially discriminatory. After Alexander A. Lawrence, Jr., a federal district court judge in Augusta, Georgia, held a hearing in early 1970 to evaluate a sex separation plan, he declared, "[I]t is difficult for me to conclude other than that racial undertones to some degree exist. Separation by sex was never proposed until complete desegregation was ordered under the plan proposed by HEW." He had come away from the hearing, he noted, "with the distinct impression that the Negro population—school and general—regard the proposal as racially belittling."¹³³ Tennessee federal district court Judge Robert M. McRae, Jr. similarly characterized African Americans' perceptions of another sex separation arrangement:

128. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's prohibition on interracial marriage).

129. Brief of Appellants at 12, *Smith*, No. 28342 (5th Cir. Oct. 1, 1969) (quoting *Loving*, 388 U.S. at 9).

130. *Id.*

131. Brief of the United States at 27-28, *Georgia*, No. 71-2563 (5th Cir. Sept 3, 1971) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 6148, 71-2563-71-2569). The U.S. brief refuted the state's reliance on *Palmer v. Thompson*, distinguishing that case on its facts: in *Palmer*, defendants ceased to operate their swimming pools, while in seven Georgia school districts, schools remained open under a racially-motivated scheme of sex separation. *Id.* at 28 n.25.

The U.S. also intervened in a proposed sex segregation scheme in Richmond County, Virginia, in 1970, arguing that the plan was "devoid of any . . . educational necessity for segregation by sex," which raised an inference that "the plan stems from . . . racially discriminatory purposes." *Segregation of Pupils By Sex Opposed*, WASH. POST, Jan. 3, 1970, at 15. Judge Robert R. Merhige, Jr. allowed the sex separation plan to go into effect despite the government's objections. See *U.S. v. Richmond County Sch. Bd.* (E.D. Va. June 10, 1970), discussed in 2 RACE REL. L. SURV. 90 (Sept. 1970). For more on Judge Merhige, see RONALD J. BACIGAL, MAY IT PLEASE THE COURT: A BIOGRAPHY OF JUDGE ROBERT R. MERHIGE, JR. (1992).

132. Brief of the United States at 29, *Georgia*, No. 71-2563 (5th Cir. Sept 3, 1971).

133. Order, *United States v. Lincoln County Bd. of Educ.*, Nos. 1400 and 1420 (S.D. Ga. Apr. 27, 1970) (Library of Congress, Records of the NAACP, V:2819, Folder: Schools, Georgia, Legal Cases, 1970-1978). See also 2 RACE REL. L. SURV. 54 (July 1970) (describing decision).

“[W]hether the defendants admit it, or whether that is the purpose of it . . . it is inescapable that to the Negro citizens it appears racial.”¹³⁴ Mississippi federal judge William C. Keady recalled in his memoir that he “employed an ingenuous plan of segregating students by sex” in the Coffeeville school district, but that this “remedy [was] vigorously objected to by blacks, who organized and maintained a school and merchant boycott of a thousand students for most of the first semester. Necessarily, such a protest induced the court to eliminate assignment by sex!”¹³⁵ And even the skeptical Judge Dawkins eventually became convinced that sex separation in Concordia Parish represented “merely a sham or device to avoid mixing members of the opposite sex and opposite race.”¹³⁶ In these cases, African Americans’ vocal opposition to Jane Crow apparently persuaded judges to invalidate sex separation schemes.

C. “Each of Us Is Aware of These Great Differences”: The Educational Purposes Defense

Because the racial motivation standard had the potential to ensnare school officials who candidly announced the reasons behind their sudden renunciation of coeducation, school districts increasingly turned to the other prong of the Fifth Circuit’s standard—the “educational purposes” defense. Despite the overwhelming predominance of coeducational pedagogy in American public schools, sex separation still enjoyed an aura of respectability and even refinement as a venerable tradition that evoked nostalgia for an earlier, less complicated era of gender relations. Many elite private and public institutions historically had separated students by sex, augmenting the practice’s stature. Sex-segregating school districts drew on these positive associations, as well as sociological assessments of single-sex education’s benefits, to defend their plans as motivated by valid educational purposes. Significantly, while it placed a premium on racially

134. *McFerren v. Fayette County Bd. of Educ.*, No. C-65-136 (W.D. Tenn. Dec. 10, 1969), quoted in *Order, Lincoln County*, Nos. 1400 and 1420, at 3 (S.D. Ga. Apr. 27, 1970); see also 1 RACE REL. L. SURV. 256 (Feb. 1970) (noting Judge McRae’s rejection of proposal to segregate high school students by sex).

135. WILLIAM C. KEADY, *ALL RISE: MEMOIRS OF A MISSISSIPPI FEDERAL JUDGE* 106 (1988); see also 2 RACE REL. L. SURV. 18 (May 1970) (describing details of the Coffeeville sex separation plan, approved in March 1970, which included grades 1-12); 2 RACE REL. L. SURV. 175-76 (Jan. 1971) (noting that the Coffeeville sex separation plan “was found by the same court to be unacceptable for further use” in October 1970, and that the court “ordered that a bi-racial advisory committee be created, made up of five Negro members to be selected by the plaintiffs in the present litigation, and five white members to be selected by the defendant school board”); *Boycott Fails as North Carolina City Begins Busing Program*, CHI. TRIB., Sept. 10, 1970, at 8 (describing arrest of one hundred African American marchers protesting sex segregation in Coffeeville). Judge Keady, who took his seat on the bench in 1968, remarked twenty years later, “Had I known the Green decision was just around the corner, my eagerness for the federal bench would have been considerably diminished.” KEADY, *supra*, at 104.

136. See 2 RACE REL. L. SURV. 174 (Jan. 1971) (citing Judge Dawkins’ August 1970 order rejecting Concordia Parish’s sex separation plan).

neutral rationales, the educational purposes defense initially remained untouched by any qualms about discrimination based on sex.

Southern school districts relied on four primary justifications for their sex separation plans: the accommodation of sex differences in learning styles and curricular interests; the enhancement of male leadership and reduction of competition from females; the financial benefits of avoiding the “needless duplication” of sex-specific resources and facilities; and the minimization of distractions and discipline problems caused by adolescent cross-sex contact. Many if not most of the pedagogical theories on which school districts relied in the late 1960s and early 1970s unabashedly flouted emerging anti-sex-discrimination norms, underscoring that these norms had yet to penetrate the debate over *Jane Crow*.

For many of *Jane Crow*’s defenders, sex differences between males and females were so self-evident that they hardly required explanation. “[O]ur school system overlooks one of the ageless and most fundamental complications of teaching—the fact that boys are different from girls. Each of us is aware of these great differences and there is no valid reason to enumerate them at this time,” wrote St. Bernard Parish, Louisiana school official Joseph Davies in 1969.¹³⁷ Accepting the justifications of the Carroll County, Mississippi school district, district court Judge William Keady affirmed that “According to good authority, opponents of coeducation . . . have argued that girl’s nature is so different from that of boy’s that a different kind of education is required, especially from the age of 12.”¹³⁸ The school board of Iberville Parish, Louisiana contended, “There are differences in boys and girls, differences in maturation rates, in vulnerability to stress, in learning styles It does make a significant difference whether the person we are teaching is a boy pupil or a girl pupil and instruction provisions should be made accordingly.”¹³⁹ Sex separation, in this view, was a natural, healthy response to real differences.

Significantly, most of the benefits sex segregation proponents cited accrued to boys. Sex separation assuaged the concerns of educators who believed that boys suffered severe disadvantages vis-à-vis girls in primary and secondary schools. Boys, according to “A Case for the Separation of the Sexes in Schools,” relied upon by several Louisiana school boards, “have more trouble with reading and speech and account for 90% of the discipline problems.”¹⁴⁰ Rather than attributing these differences to the “traditional” assumption that boys mature more slowly than girls, the experts cited by the school boards “have wondered if the real reason was

137. Joseph J. Davies, Jr., *A Case for the Separation of the Sexes in Schools*, THE BOARDMAN, Jan. 1969, at 4, 5.

138. *United States v. Carroll County*, No. 6541K (N.D. Miss. 1969), *quoted in Order*, *Lincoln County*, Nos. 1400 and 1420 (S.D. Ga. Apr. 27, 1970).

139. *A Case for the Separation of the Sexes in Schools*, in Appendix, Brief of Plaintiffs-Appellants at 114, *Williams v. Iberville Parish Sch. Bd.*, No. 28571 (5th Cir. [date unavailable]) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4290, 28569-28571).

140. *Id.*

that boys entering school are forced to conform to feminine standards of behavior.”¹⁴¹ Sure enough, experiments in single-sex education demonstrated that, in the absence of girls, boys “showed more excitement and real interest in school,” “were found to speak more freely taught by a man than in a class with girls taught by a woman,” and were “more thoughtful and considerate of each other.”¹⁴² Other studies showed that “boys in separate classes have made better progress in language arts and math than boys in control [co-ed] classes. Group morale developed as the boys bec[a]me aware of their common interests and problems and began to accept themselves and one another.”¹⁴³ Similarly, one of the only judges to make concrete factual findings regarding educational outcomes in sex-segregated schools found that “the achievement level of the male students had shown substantial improvement with no lessening in the level of the female students’ improvement,” and identified “measurably improved leadership qualities on the part of the male students,” but no similar enhancement of female leadership.¹⁴⁴

In fact, sex segregation proponents cited female leadership as a drawback of coeducational schools. These educators were not hostile to female assertiveness in a single-sex context; in fact, they speculated that girls would benefit from “an environment which permits them to view men and boys as colleagues, not competitors.”¹⁴⁵ Rather, school officials worried about the female “domination of positions of leadership” in coeducational schools and expressed concern that “[i]n coeducational schools girls generally are more interested in excelling academically and boys have a tendency to withdraw when placed in competition with girls.”¹⁴⁶ Fortunately, according to Superintendent Davies, girls did not forsake the aesthetic benefits of coeducational schools when they converted to single-sex status: in St. Bernard Parish, “[g]irls continue to dress . . . appropriately although there are no boys to dress up for.”¹⁴⁷ In Taylor County, Georgia, where sex segregation persisted until the late 1970s, some teachers were less satisfied with their male students’ sartorial and academic showing, reporting that high school boys in all-male environments “became careless about their appearance” and “apathetic about their schoolwork,” while the girls continued to outperform their male counterparts academically.¹⁴⁸ Nevertheless, the consensus among proponents of sex separation was that single-sex schools would assuage the problem of female domination and academic superiority, by giving

141. *Id.*

142. *Id.* at 114, 117.

143. *Id.* at 116.

144. *United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 621 n.3 (1977) (quoting District Court Judge Dan M. Russell, Jr.).

145. *A Case for the Separation*, *supra* note 139, at 117.

146. Davies, *supra* note 137, at 6.

147. *Id.*

148. Dillin, *supra* note 114, at 10.

boys an opportunity to excel and participate without feeling browbeaten by intersexual competition or alienated from the “feminine” environment of the coeducational classroom.¹⁴⁹

Some school districts also touted the pedagogical and financial benefits of sex-specific curricular specialization. Most if not all of the Jane Crow districts maintained different course offerings at the boys’ and girls’ schools, especially when it came to vocational studies. For instance, one Georgia school board explained that under its sex segregation scheme, “[c]ourses in Homemaking, Business Education, Family Living would be emphasized for the female students, whereby on the other campus, Vocational Agriculture, Industrial Arts, Shop programs, Brick Masonry, Electrical Work and Mechanics would be emphasized in the school serving the male students.”¹⁵⁰ Further, in their zeal to prove that economic, and not racial, considerations underlay the decision to segregate by sex, school officials boasted that separate boys’ and girls’ campuses obviated the need for unnecessary duplication of facilities. Describing St. Bernard Parish’s initial foray into sex separation, Superintendent Davies admitted that school officials “felt that certain problems which might arise in newly integrated schools would be lessened if the sexes were separated,” but claimed that economic frugality was the predominant consideration in converting from coeducational to single-sex schools.¹⁵¹ Increasing enrollment, Davies explained, had created the need for two additional secondary schools in the parish. Of the two existing high schools, only one had a high-quality athletic facility; if the schools were to remain coeducational, two brand-new, top-flight athletic facilities would be necessary, and the district would have to upgrade the second high school’s sub-par accommodations. A brilliant solution struck parish officials: separate the sexes! “Instead of spending money for four first rate athletic

149. These ideas also had currency outside the courts during the 1960s. Roanoke and Fairfax Counties in Virginia experimented with sex segregated classrooms in the early 1960s, for the express purpose of improving boys’ academic performance. See *Segregating Pupils By Sex Is Termed Virginia Success*, WASH. POST, Mar. 14, 1963, at B4. *Washington Post* columnist Dorothy Rich wrote in 1966 of a growing movement toward experimentation with single-sex learning environments in order to ameliorate achievement gaps between boys and girls. She cited benefits to boys including fewer discipline problems, greater interest in learning, “tremendous spirit,” and curricular tailoring, including a greater emphasis on “science and transportation study that often doesn’t interest girls.” She opined that “[i]f grouping the boys together will help them combat the overwhelming ‘momism’ of the early school years (almost all elementary school teachers are women), then it is all for the good.” Dorothy Rich, *Separating the Boys and Girls*, WASH. POST, May 15, 1966, at F26. In 1968, Professor Patricia Caye Sexton of New York University published a study concluding that the “feminine” environment of elementary schools had deleterious effects on boys, particularly “lower class” boys, who she said tended to be “more masculine” than middle-class males. Professor Sexton recommended that “schools become more masculine with more technological and independent work-study programs and more male teachers—real he-men types.” Dorothy Rich, *Schools Versus Boys*, WASH. POST, Feb. 18, 1968, at G16.

150. Order, *United States v. Lincoln County Bd. of Educ.*, Nos. 1400 and 1420 (S.D. Ga. Apr. 27, 1970) (Library of Congress, Records of the NAACP, V:2819, Folder: Schools, Georgia, Legal Cases, 1970-1978).

151. Davies, *supra* note 137, at 6.

plants,” Davies related triumphantly, “only two were necessary if the sexes were separated and on the basis of the cost of these, the Board saved a million and half dollars by eliminating needless duplication of athletic plants.”¹⁵²

Finally, school districts argued that coeducation distracted boys and girls from their studies during the turbulent, sexualized adolescent years, and that single-sex schools would mitigate resulting discipline problems. “A Case for the Separation of the Sexes,” for instance, cited studies showing that “the lack of distractions from the opposite sex” resulted in “better work habits” for both boys and girls and “fewer discipline problems.”¹⁵³ Wrote Davies, “It is generally agreed that the ages of twelve to fifteen are the worst years for boys and girls to be educated together. . . . ‘[P]utting girls and boys together in the same school is not necessarily the normal, healthy thing to do.’”¹⁵⁴ When the Jefferson Parish, Louisiana school board proposed reinstating coeducation in the parish’s high schools in 1973 after more than a decade of sex segregation, supporters of maintaining single-sex campuses often cited unspecified “disciplinary problems” as among the “innumerable difficulties” coeducation would produce.¹⁵⁵ One newspaper account alluded to a school board meeting discussion where “references [were] made to young men as animals who would destroy” the girls’ schools.¹⁵⁶

The arguments for single-sex schools that highlighted sexual distractions and discipline problems dovetailed nicely with underlying fears about interracial sexual contact and social intimacy, without referring directly to race. The equation of racial integration with sexual and social disorder had long been a prominent theme in segregationist ideology, and as desegregation proceeded, its opponents seized every opportunity to trumpet the vindication of their worst fears. The mid-1950s saw an uproar over “disciplinary and sex problems” in the newly desegregated District of Columbia schools, as congressional hearings featured testimony concerning the alleged “manhandling” of girls in the hallways, a spike in pregnancies and venereal disease, a general increase in physical altercations, and the distribution of pornography among students.¹⁵⁷ A congressional report blamed integration for these ills, and recommended

152. *Id.* at 5.

153. A Case for the Separation, *supra* note 139, at 117.

154. Davies, *supra* note 137, at 4-5 (quoting James S. Coleman of Johns Hopkins University).

155. Mrs. Edward Groner & Mrs. E.J. LaCombe, Metairie Women’s Club, Letter to the Editor, *Against Jeff Coeducation*, NEW ORLEANS TIMES-PICAYUNE, Jan. 14, 1973, §2, at 2; *see also* Emile LaFourcade, Jr., *Harahan Board Opposes Sex Integration in Schools*, NEW ORLEANS TIMES-PICAYUNE, §1, at 9 (noting the observations of an alderman and former school bus-driver that “a school busload of girls or of boys is much easier to control than when boys and girls are on the same bus”).

156. Fred Barry, *Jeff to Vote on Coed Issue*, NEW ORLEANS TIMES-PICAYUNE, Jan. 18, 1973.

157. *Integration Setbacks*, N.Y. TIMES, Sept. 23, 1956, at 186; *Sex Problems Bob Up in Wake of Integration*, CHI. DAILY TRIB., Sept. 20, 1956, at C3; *Teachers Tell Integration’s Sex Problems*, CHI. DAILY TRIB., Sept. 27, 1956, at A2.

restoring racial segregation to prevent white flight from the nation's capital.¹⁵⁸ Whites' exodus to the suburbs continued, but the District began a "pioneer program of sex education" in several elementary schools in 1959, citing the need to curb unwed motherhood.¹⁵⁹

By the late 1960s, concerns about desegregation combined with anxiety over the sexual revolution that many conservatives believed was corrupting the nation's youth and undermining traditional morality.¹⁶⁰ Resistance to sex education and busing often became twin causes for parents suspicious of education policies that ceded control of school assignment and curricula to what many saw as a dangerous liberal plot to impose the counterculture on innocent children. Advocates sometimes connected their campaign against sex education with their opposition to busing, identifying both as reactions to what one Virginia mother called "a whole new morality . . . sensitivity training and social planners with their philosophy."¹⁶¹ Racial fears did not necessarily underpin parents' reactions, and indeed some African American parents may have shared these concerns about sex education. White supremacists, however, made the link between integration and sex education explicit: in a 1969 editorial, *The Citizen* asserted that white parents' real concern was not just about inappropriate curricula, or even about sex education as a Communist conspiracy, as the John Birch Society charged.¹⁶² Rather, the problem was that "sex education was taking place in *integrated classes!*" "Integration plus sex education equals miscegenation," the editors warned.¹⁶³ Anxieties about integration mixed with apprehension about growing sexual

158. Eve Edstrom, *Davis Unit Report Hits Fast School Integration*, WASH. POST, Dec. 28, 1956, at A1; Willard Edwards, *Resegregation of Washington Schools Urged*, CHI. DAILY TRIB., Dec. 29, 1956, at 3; Bess Furman, *Four in House Urge Capital Segregation*, N.Y. TIMES, Dec. 29, 1956, at 1. But see Richard L. Lyons & Eve Edstrom, *Integration Called Miracle of Social Adjustment Here*, WASH. POST, Feb. 11, 1957, at B7 (describing Anti-Defamation League report that applauded the transition to racially integrated schooling in Washington, D.C.).

159. Roger Greene, *Unwed Mothers—What Can We Do?*, CHI. DAILY TRIB., Aug. 9, 1959, at E6.

160. See Neil Ulman, *A Delicate Subject: Sex Education Courses Are Suddenly Assailed by Many Parent Groups*, WALL ST. J., Apr. 11, 1969, at 1.

161. In 1970, the Virginia House of Delegates considered anti-busing and sex education bills simultaneously. See *Busing, Sex Bills Gain in Virginia*, WASH. POST, Mar. 3, 1970, at C1. See also Bart Barnes, *Prince George's Busing Foes Change Tactics*, WASH. POST, June 10, 1973, at B1.

162. On the John Birch Society's involvement in the anti-sex education campaign, see Ulman, *supra* note 160, at 1.

163. Editorial, *I + SE = M*, THE CITIZEN, June 1969, at 2. See also Medford Evans, *Sex Education in Integrated Schools*, THE CITIZEN, June 1969, at 12. By the early 1970s, white supremacists had taken their argument one step further: if only interracial marriage were the worst outcome imaginable, lamented Robert Kuttner. But Kuttner's forays into Harlem convinced him that white Southerners' apprehension was desperately naïve. In fact, "the average ghetto Black had [no] intentions as respectable as marriage" for the young white middle-class women he allegedly seduced into prostitution to finance his drug habit. Robert E. Kuttner, *Northern Light on the Southern Scene*, THE CITIZEN, Nov. 1972, at 26. Indeed, Kuttner warned, the daughters of white liberal upper middle-class families were the most vulnerable to what he called "remote-control integration": teaching children that integration was good without exposing them to its horrors could be the downfall of well-meaning white girls. *Id.* at 25-26.

permissiveness and parents' perceived loss of control over their children's education.¹⁶⁴

Theories of adolescent sexual distraction provided a race-neutral language with which to express the concerns that had animated sex separation in the first place. Indeed, the Louisiana school districts that made "A Case for the Separation of the Sexes" had, just a few years earlier, been racial battlegrounds. The New Orleans suburb of St. Bernard Parish, for instance, had long been controlled by the fanatical and autocratic politician Leander Perez. Perez, with the help of Superintendent Davies and others, had conspired to create an all-white public school "annex" in St. Bernard for white children assigned to the two New Orleans schools where violent mobs accosted black six-year-olds attempting to integrate in 1960.¹⁶⁵ Notwithstanding his later enthusiasm for economy in the construction of school facilities, Davies apparently had been less concerned about thrift in 1961, when he announced that the parish, "already operating its schools in the red, would find a means of paying the certified teachers" employed to teach the white refugees from New Orleans in a converted automobile plant in Arabi.¹⁶⁶ Then again, he had had ample financial assistance in setting up the annex—from the state of Louisiana, which supplied free textbooks and lunches and later appropriated \$300,000 to assist the school board; from volunteers who constructed classrooms using donated materials; and from a network of private buses leased by a parents' cooperative.¹⁶⁷ Other Jane Crow districts in Louisiana had also experienced racial turbulence in the 1960s. Iberville Parish, just south of Baton Rouge, had been the site of racial unrest in 1963, and the target of a lawsuit by black parents and the NAACP demanding immediate racial desegregation.¹⁶⁸ Federal district court judge E. Gordon West had ordered the Iberville Parish schools to desegregate in 1964, despite his professed agreement with school board attorneys that court-ordered desegregation did more harm than good, and that white

164. For a fascinating sociological study of the larger debate over sex education in schools, irrespective of its racial implications, see KRISTIN LUKER, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES* (2006).

165. On the peculiar politics of St. Bernard Parish, see Fairclough, *supra* note 88, at 57.

166. *Louisiana: Court Refuses Return to School Segregation*, SOUTHERN SCHOOL NEWS, Jan. 1961, at 1, 10. The converted factory housed a makeshift school for first- through third-graders, while fourth- through sixth-graders from New Orleans attended the regular, segregated public schools of St. Bernard Parish. In February 1961, New Orleans superintendent James F. Redmond estimated that of the 1,019 white students who previously attended the two schools at which desegregation had been attempted, only forty-nine remained in New Orleans public schools, and at least six hundred were attending school in St. Bernard Parish. *Where Have Withdrawn Pupils Gone?*, SOUTHERN SCHOOL NEWS, Feb. 1961, at 6.

167. *Louisiana: Court Refuses Return*, *supra* note 166, at 10; *Louisiana: Court Postpones Hearing on Complete Desegregation*, SOUTHERN SCHOOL NEWS, June 1961, at 9.

168. *Southern School News* described the unrest as follows: "Negro students of Plaquemines's Iberville High School staged a boisterous book-throwing melee Oct. 4, sparking a series of events that included closing of the school, a systemwide boycott of Negro schools and several street demonstrations that were dispersed by tear gas." *New Orleans Negroes Petition Board for More Desegregation*, SOUTHERN SCHOOL NEWS, Nov. 1963, at 9.

children were likely to suffer psychological damage from attending integrated schools.¹⁶⁹

Skeptics could thus be forgiven their doubts that the “educational purposes” cited by school boards were the genuine rationales motivating sex segregation. By the end of the decade, critics enjoyed some success in convincing judges that sex separation schemes were motivated by racial discrimination. At the same time, however, none of them suggested that separate schools for boys and girls posed any problem of sex discrimination. School districts could cite sex segregation’s educational benefits to boys and trumpet the virtues of sex-specific curricular specialization with impunity. As Part III shows, the women’s rights revolution would change all that.

III. “SEPARATE CAN NEVER BE EQUAL”: THE RISE OF THE SEX DISCRIMINATION ARGUMENT AGAINST JANE CROW

The educational justifications for sex separation enumerated by school districts in the late 1960s and early 1970s reveal a gaping sex discrimination lacuna in the Jane Crow discourse. Indeed, all parties to Jane Crow litigation during this period assumed that sex separation did not, in the absence of racially discriminatory motivation, pose a constitutional question. Thus the Concordia Parish School Board could argue unabashedly that because the “advantages and disadvantages attendant upon a separation by sex plan *are all related to sex* and not to race,” there was no constitutional issue to be resolved.¹⁷⁰ Similarly, Georgia’s brief in *United States v. Georgia* declared:

Separation by sex may well help in making racial integration work in some school systems. In any event, decisions on such matters *obviously do not on their face directly and sharply implicate any basic constitutional values* and hence should be left to the affected

169. *Iberville Parish Schools Ordered to be Desegregated*, SOUTHERN SCHOOL NEWS, Aug. 1964, at 4 (“Judge West agreed with school board attorneys that more harm than good has been done the public school system through desegregation rulings, but he said, ‘Be that as it may, the court has to follow the law and will follow the law.’ Defense counsel, in responding to the petition, had held that psychological damage would be done to white children placed in desegregated schools. West said he personally felt there was merit in this defense but higher courts had ruled otherwise.”). Judge West was not much more enthusiastic by 1969. See 1 RACE REL. L. SURV. 109 (Sept. 1969) (“Though acknowledging his duty to carry out the mandate of the court of appeals, [Judge West] expressed his opinion that the mandate ‘is both ill-advised and legally wrong.’”); 1 RACE REL. L. SURV. 164-65 (Nov. 1969) (“To require attempts to bring about complete desegregation by September, 1969, would, in [Judge West’s] opinion, ‘cause nothing but complete disruption of the entire system.’”).

170. See Brief of Appellees at 8, *Smith v. Concordia Parish Sch. Bd.*, No. 28342 (5th Cir. Nov. 11, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349) (emphasis added). Notably, C.J. Duckworth, executive director of the all-black Mississippi Teachers Association, apparently did not believe that African American parents had legal recourse against sex segregation. “As long as black boys and white boys are in class together, I don’t think they have a legitimate complaint,” he remarked in reference to a 1970s boycott against sex segregation in Coffeeville, Mississippi. “I’m sorry [the students are boycotting] because it’s simply a boy versus girl thing.” Quoted in *Boycott Sex Bias*, CHICAGO DAILY DEFENDER, Sept. 3, 1970, at 12.

local school boards¹⁷¹

The school boards were not the only parties operating under this assumption. When Fifth Circuit judges Griffin Bell, Homer Thornberry, and Lewis Morgan held a question-and-answer session for school desegregation attorneys in November 1969, Judge Bell made clear that the court's primary concern about plans that called for sex separation was whether the boys' and girls' schools would each have a racial balance proportional to the school population.¹⁷² Federal District Judge William Keady of Mississippi opined that "the concept [of sex separation] embraces a philosophy that has not been held contrary to the United States Constitution and must, therefore, be approved."¹⁷³ The Concordia Parish board could therefore assert with confidence a "complete absence of any legal authority for an attack on separation of the sexes."¹⁷⁴ School districts had merely to assert a legitimate "educational purpose" for segregating boys and girls and hope that their fervent disavowals or tacit admissions of racial motivation would win over the courts—or at least not draw unwanted judicial attention.

Just a few short years transformed the legal landscape. By 1974, feminist efforts in the legislative arena and in the courtroom had produced powerful statutory and constitutional weapons against sex discrimination. By 1977, when advocates sought to root out the last vestiges of sex segregation in the South, a sex discrimination paradigm based largely on an analogy to race had come to dominate an anti-segregation campaign that, before 1970, had been utterly silent on the subject of sex-based inequality.

171. Brief of the State of Georgia, et al., at 18, *United States v. Georgia*, Nos. 71-2563 & 12972 (5th Cir. Sept. 16, 1971) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 6148, 71:2563-71:2569) (emphasis added).

172. Proceedings at 79-80, *United States v. Hinds County Sch. Bd.*, Nos. 28030 & 28042 (5th Cir. Nov. 6, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4163, Nov. 1969 (pt.)-March 1970). In fact, the Fifth Circuit panel ordered the Wilkinson County, Mississippi, school district to implement the HEW proposal after the board failed to make a showing regarding the racial composition of the proposed girls' schools. Order, *United States v. Hinds County Sch. Bd.* and *United States v. Wilkinson County Sch. Dist.*, Nos. 28030 & 28042 (5th Cir. Dec. 22, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4163, Nov. 1969 (pt.)-March 1970). Around this time, one newspaper report quoted Judge Bell as responding to a civil rights attorney's claim that sex segregation was racially insulting with the comment, "You're trying to get the last ounce of flesh out of these people, aren't you?" Peter Milius, *Desegregation Case Appears Dim to Counsel*, WASH. POST, Nov. 19, 1969, at A2.

173. *United States v. Carroll County*, No. 6541K (N.D. Miss. 1969), quoted in Order, *United States v. Lincoln County Sch. Bd.*, Nos. 1400 and 1420, at 3 (Apr. 27, 1970) (Library of Congress, Records of the NAACP, V:2819, Folder: Schools: Georgia, Legal Cases, 1970-1978).

174. Brief of Appellees at 6, *Smith v. Concordia Parish Sch. Bd.*, No. 28342 (5th Cir. Nov. 13, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349).

A. "Sex Separation as Sex Discrimination": The Revolution in Sex Equality Law

Advocates of women's rights had little success in mounting legal challenges to sex-segregated education in the fifteen years after *Brown*. As we saw in Part I.B., feminists' 1950s attempts to apply race precedents like *Sweatt*, *McLaurin*, and *Brown* to end the exclusion of women from public universities were unsuccessful. Feminists achieved two significant breakthroughs in 1969, revitalizing the race-sex analogy as a rhetorical and constitutional weapon.¹⁷⁵ Alice de Rivera, a thirteen-year-old Brooklyn girl, sued for admission to the prestigious Stuyvesant High School in New York City, arguing that "[s]ex, as race, is a form of segregation that is not tolerated by the 14th amendment,"¹⁷⁶ and that maintaining all-male elite public schools made girls "second-class citizens."¹⁷⁷ When a ruling in DeRivera's favor appeared likely, the Board of Education—headed by John Doar, former Assistant Attorney General for Civil Rights—voted to admit her to Stuyvesant.¹⁷⁸ Several months later, a federal district court gave tentative approval to a coeducation plan for the formerly all-male undergraduate division of the University of Virginia. Like the DeRivera case, *Kirstein v. Board of Rectors of the University of Virginia* relied heavily on an analogy between sex and race segregation. The court's initial ruling reflected this close relationship: as Judge Robert Merhige wrote, "If racial segregation in State supported institutions is a denial of the due process of law guaranteed by the Constitution, as indeed it is, then the allegations . . . [are] indeed a patent denial of due process and equal treatment required by law."¹⁷⁹ A three-judge district court went on to declare in 1970 that the exclusion of women from the college violated equal protection, though the court

175. In the late 1960s and early 1970s, coeducation increasingly began to supplant single-sex schooling in elite colleges and secondary schools. For instance, coeducation began at Yale and Princeton in 1969, at Brown in 1971, and at Dartmouth in 1972. Harvard and Radcliffe Colleges effectively merged in 1972. New York's Stuyvesant High School first admitted girls in 1969; Boston Latin in 1972, Phillips Academy (Andover) and Phillips Exeter in 1973.

176. Associated Press, *Girl, 13, Wins Entry to All-Male School*, EVENING STAR (Washington, D.C.), May 3, 1969, at A-2 (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, MC 477, Box 9, Folder 44) (quoting DeRivera's attorney Eleanor Jackson Piel).

177. United Press International, *Sex Makes Difference in Legal Disputes*, FAYETTEVILLE (N.C.) OBSERVER, Apr. 10, 1969 (Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, MC 477, Box 9, Folder 44). DeRivera's attorneys relied heavily on a race-sex analogy. See Memorandum of Law in Support of Petition 4-9, *DeRivera v. Flidner*, No. 00938-69 (N.Y. Sup. Ct. June 5, 1969) (Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, MC 477, Box 9, Folder 44).

178. Associated Press, *Girl, 13, Wins Entry*, *supra* note 176, at A-2. John Sandifer, the judge hearing DeRivera's case was African American, and according to one observer, "appreciated the relationship to the *Brown* case." Memorandum from Catherine East to Elizabeth Duncan Koontz, May 2, 1969, Re: New Developments in the De Rivera Case (Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, MC 477, Box 9, Folder 44).

179. Memorandum, *Kirstein v. Univ. of Virginia*, No. 220-69-R, Sept. 8, 1969, at 2 (Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, MC 477, Box 10, Folder 7).

“declined to go further and to hold that Virginia may not operate any educational institution separated according to the sexes.”¹⁸⁰ In other words, sex-segregated education might not, like racial segregation, be “inherently unequal.” Philip Hirschkop, who argued the case for the Virginia ACLU, wrote to fellow women’s rights lawyers, “While we managed to desegregate the University of Virginia, which is what we set out to do, I had hoped for more. At any rate, we must accept our victories.”¹⁸¹ Ruth Bader Ginsburg was more upbeat, calling the decision a “landmark” and a “path-breaker.”¹⁸²

Meanwhile, feminists expressed dismay over the renewed enthusiasm for sex segregation as an accompaniment to racial desegregation, and encouraged the Justice Department to intervene in the Jane Crow cases.¹⁸³ Catherine East, technical secretary to the Citizens’ Advisory Council on the Status of Women, offered a typical analysis: “Separate education based on either sex or race has never been equal and is undoubtedly inherently unequal.”¹⁸⁴ But although women’s rights advocates tried to enter the debate over sex segregation in racial desegregation plans,¹⁸⁵ the plaintiffs and attorneys who challenged these plans in 1969-70 were not yet incorporating arguments about sex discrimination into their rhetorical or legal arsenal. A *University of Chicago Law Review* student note by Robert Barnett helped to disseminate such arguments on the eve of a revolution in constitutional sex equality doctrine.¹⁸⁶ “The Constitutionality of Sex Separation in School Desegregation Plans,” which circulated among desegregation lawyers before and after its publication in 1970, advanced three approaches to challenging sex separation schemes. The

180. *Kirstein v. Univ. of Virginia*, 309 F. Supp. 184, 187 (D.C. Va. Feb. 9, 1970). Judge Merhige did not apply a full-blown race-sex parallel to Jane Crow, either, when he considered a sex segregation plan in Richmond County the following year. See *supra* note 131.

181. Letter from Philip J. Hirschkop to Mel Wulf, Re: *Kirstein v. Rector and Visitors of the University of Virginia* (Feb. 12, 1970) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Human Rights for Women Papers, 83-M229, Box 1, Folder: Kirstein).

182. Letter from Ruth Bader Ginsburg to Bernice Sandler (Sept. 8, 1970) (on file with the Library of Congress, Ruth Bader Ginsburg Papers, Container 7, Folder: Rutgers College, New Brunswick, NJ, Coeducation, 1970).

183. Citizens Advisory Council on the Status of Women, U.S. Department of Labor, *Separation of the Sexes in School Desegregation Plans*, May 27, 1969 (Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, MC 477, Box 9, Folder 37) (noting decisions upholding sex segregation in St. James Parish, Louisiana and Carroll County, Mississippi, and urging women’s advocates to write to the Attorney General and Assistant Attorney General for Civil Rights).

184. *Id.* East continued: “At best, the girls whose talents lay in science and math would have an inferior education and boys whose talents lay in verbal areas would likewise be slighted. The best teachers would go to boys and the best equipment. Sociologically, boys and girls need this opportunity to establish relationships to each other as human beings. Separation of the sexes in education can only lead to greater polarization in adult lives.” *Id.*

185. Women’s rights advocate Dorothy Kenyon was aware of (and indignant about) sex segregation proposals in the 1950s. See Letter from Dorothy Kenyon to Rowland Watts, Staff Attorney, ACLU (Apr. 24, 1959) (Mudd Library, Princeton University, ACLU Records, Box 1142, Folder 22).

186. Note, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296 (1970).

first concerned “sex separation as racial discrimination,” another addressed “sex separation as limiting freedom of association”—but Barnett took his analysis a step further and argued for “sex separation as sex discrimination.”

Significantly, Barnett based his sex discrimination argument on “a parallel to the harms found in race separation,” relying on “evidence pointing to the conclusion that the same psychological detriments, alleged to harm the segregated black, may also harm the separated female.”¹⁸⁷ In developing his argument that “[t]he status and problems of the woman in America present a curious parallel to those of the black,”¹⁸⁸ Barnett could cite a growing literature developing an analogy between race and sex inequality, including works by sociologist Gunnar Myrdal, social psychologist Helen Mayer Hacker, anthropologist Ashley Montagu, and lawyers Blanche Crozier, Pauli Murray, and Mary Eastwood.¹⁸⁹ Like racial segregation, Barnett extrapolated, sex separation would also lead to material and educational harms, “resulting in an atmosphere which inadequately prepares one for the realities of social life in a world of two sexes.”¹⁹⁰ Barnett also saw strategic potential in the Jane Crow cases. “It may be,” he suggested, “that sex separation in school desegregation plans . . . presents an ideal situation for a challenge to the validity and viability” of the Supreme Court’s refusal to regard sex classifications as constitutionally suspect.¹⁹¹

While the Jane Crow controversy did not play the prominent test case role Barnett foresaw, his sex discrimination argument nevertheless anticipated a revolution in sex equality law between 1970 and 1974.¹⁹²

187. *Id.* at 315.

188. Barnett continued:

Women, like blacks, are characterized by a high social visibility expressed in physical appearance, dress, and patterns of behavior setting them apart as a distinct ‘class.’ Besides a high degree of visibility, women and blacks also share the dubious distinction of being the victims of very similar arguments used by the dominant group to justify the inferior position accorded them, including inferior intelligence, scarcity of geniuses, freedom in instinctual gratifications, and emotionalism. Both groups were assigned a ‘place’ in society, whether it be the field or the home, and were barred from education, suffrage, certain jobs, and political office. Most significantly, the actions of the dominant groups toward both blacks and women were thought to be in the best interest of the subordinate groups.

Id. at 312-13.

189. On the race-sex analogy, Barnett cited ASHLEY MONTAGU, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (1948); MYRDAL, *supra* note 19; Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723 (1935); Helen Mayer Hacker, *Women as a Minority Group*, 30 SOCIAL FORCES 60 (1951); and Murray & Eastwood, *supra* note 3. I have discussed the development of legal race-sex analogies in Serena Mayeri, Note, “A Common Fate of Discrimination”: *Race/Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001).

190. Barnett, Note, *supra* note 186, at 316.

191. *Id.*

192. Barnett’s note circulated within the women’s rights advocacy community after its publication. See, e.g., Letter from Ruth Bader Ginsburg to Barbara Esposito (Mar. 29, 1971) (Library of Congress, Ruth Bader Ginsburg Papers, Container 7, Folder: Rutgers College, New Brunswick, NJ, Coeducation, Mar.-Apr. 1971) (citing Barnett note).

Almost a half-century after it was first proposed, Congress passed the Equal Rights Amendment and sent it to the states for ratification in 1972. The same year, the Education Amendments to the Civil Rights Act mandated equality of educational opportunity for women and girls.¹⁹³ Known as Title IX, the provision prohibiting sex discrimination in education passed with relatively little fanfare, as heated debates over busing dominated coverage of the bill. *Wall Street Journal* reporter Jonathan Spivak presciently predicted, “Overshadowed by the busing fuss . . . [the] strict ban against sex discrimination [in education] . . . could be a major source of contention in the future.”¹⁹⁴

Title IX was not the only piece of sex discrimination legislation to slide through Congress without prolonged public debate. Two years later, a little-noticed provision of the Equal Educational Opportunity Act (EEOA) prohibited pupil assignments based on sex as well as race, color, religion, and national origin.¹⁹⁵ The busing controversy again overshadowed the sex discrimination issue: press coverage of the EEOA’s passage mentioned the inclusion of sex only in passing, and no legislative history survives to explain its origins. Two years earlier, though, Dr. Bernice Sandler of the Women’s Equity Action League (WEAL) had voiced the suspicion that Nixon’s proposed anti-busing bill had purposely omitted sex from the prohibited categories of pupil assignment in order to “permit the operation of sex segregated schools as a means of maintaining partial racial segregation—the segregation of black boys and white girls.”¹⁹⁶ Sandler also expressed sex discrimination concerns. She told the *New York Times* that she “doubt[ed] very much that the girls’ schools would have equal science facilities, physical education programs and vocational programs.”¹⁹⁷ The final bill, passed in 1974, was responsive to Sandler’s objection, despite a lack of legislative history confirming the EEOA’s intended applicability to Jane Crow.

In the meantime, Ruth Bader Ginsburg and the ACLU Women’s Rights Project convinced four Supreme Court Justices to accept a constitutional analogy between race and sex discrimination in the 1973 case *Frontiero v. Richardson*.¹⁹⁸ *Frontiero* was, as it turned out, the high-water mark for the

193. 20 U.S.C. §1681 (2005).

194. Jonathan Spivak, *New Higher-Education Bill Provides More Funds, but Sex-Bias Section Could Spark Controversy*, WALL ST. J., Jul. 13, 1972, at 36. For more on the stealthy passage and thorny implementation of Title IX, see JOHN DAVID SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 230-62 (2002).

195. See *supra* note 10.

196. Eileen Shanahan, *Nixon Aid Sought on Equal Rights*, N.Y. TIMES, Mar. 18, 1972, at 15.

197. *Id.*

198. 411 U.S. 677, 685 (1973) (Brennan, J., plurality opinion) (“[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself ‘preservative

constitutional race-sex analogy, but it confirmed the rapid ascendance of a theory that the Court had soundly rejected a dozen years earlier.¹⁹⁹ Sex-based legal classifications no longer were subject to the lax rational basis standard of review;²⁰⁰ instead, lower courts argued over how strictly to scrutinize laws that distinguished between males and females. It was far from clear what the women's rights revolution would mean for sex-segregated education, but a new universe of legal theories and precedents unquestionably was available to sex segregation's foes by the time that ACLU attorney Jack Peebles filed a complaint on behalf of Kenlee Helwig and other plaintiffs in Jefferson Parish, Louisiana, in 1974.²⁰¹

B. "Inherently Discriminatory Toward Women": *Helwig v. Jefferson Parish School Board*

Helwig v. Jefferson Parish School Board was the first Jane Crow lawsuit to place sex discrimination at the center of the case against sex segregation. Jefferson Parish, a rapidly growing middle-class community adjacent to New Orleans, had not gained the notoriety of its neighboring parishes, Orleans and St. Bernard, in the early 1960s struggle against racial desegregation. Unlike many of the school districts that later turned to Jane Crow, Jefferson Parish was predominantly white—African Americans comprised a little over twenty percent of the student population. Nevertheless, Jefferson could hardly boast a racially harmonious past. Like St. Bernard, Jefferson Parish had segregated its high schools by sex in the early 1960s in anticipation of possible racial desegregation, though none initially occurred.²⁰² In 1962, demonstrations greeted the arrival of black children at Our Lady of Prompt Succor in Westwego, and enrollment at the private Catholic school plummeted from a high of almost eight hundred students before desegregation, to about five hundred after desegregation was announced, and to a low of 118 after

of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later")

199. In *Hoyt v. Florida*, the Court rejected the notion that exempting women from jury service degraded their citizenship rights. Justice Harlan wrote: "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved for men, woman is still regarded as the center of home and family life." 368 U.S. 57, 61-62 (1961).

200. The rational basis standard of review required only that laws classifying individuals on the basis of sex be reasonably related to a legitimate government objective. Until 1971, the Supreme Court never invalidated a sex-based legal classification under this standard. See *Reed v. Reed*, 404 U.S. 71 (1971) (finding an Idaho law preferring male estate administrators unconstitutional).

201. The suit was filed on behalf of Kenlee Helwig by her parents, Carl and Jeanne Helwig, and William Helis by his parents, Kathleen and James Helis. *Sex Separation in Schools Hit*, NEW ORLEANS TIMES-PICAYUNE, Aug. 2, 1974, §1, at 6. Later, Peebles filed another suit on behalf of Nancy Birgit Anderson and Laura Ellen Tracy, challenging the constitutionality of the Louisiana statute authorizing sex-segregated school assignments. *Suit Attacks Jeff Non-Coed School Setup*, NEW ORLEANS TIMES-PICAYUNE, Jul. 20, 1976, §1, at 1.

202. See, e.g., Editorial, *Boys and Girls Together*, NEW ORLEANS TIMES-PICAYUNE, Oct. 1, 1977, §1, at 22 ("[Sex segregation] was begun 15 years ago in response to a court order to end racial segregation").

angry protests rocked the community.²⁰³ Undeterred, in July 1964, twenty-five African American students appeared at West Jefferson High School, a public school, to request enrollment for the coming year.²⁰⁴ They were rebuffed, and shortly thereafter, a suit was filed on behalf of Lena Vern Dandridge and fifteen other students. In 1965, Dandridge was one of twenty African American girls to desegregate the all-female and formerly all-white Riverdale High School under a freedom-of-choice plan.²⁰⁵

Sex segregation in Jefferson Parish high schools did not go uncontested in the 1960s. In 1966-67, when the school district announced plans to build two new high schools, the Jefferson Parish Committee for Better Schools called for the reinstatement of coeducation.²⁰⁶ The committee cited education experts from Loyola, Tulane, and Louisiana State University, who testified to coeducation's pedagogical superiority.²⁰⁷ In October 1969, several months after Judge Herbert Christenberry approved a school board plan involving sex separation in grades 9-12,²⁰⁸ over one hundred African American students protested sex segregation in a demonstration at West Jefferson High School.²⁰⁹

White school officials, however, remained convinced that racial desegregation could not proceed without sex segregation. Interviews conducted by concerned members of the Jefferson Parish chapter of the National Organization for Women (NOW) in late 1969 reveal that the superintendent and school board members did not dispute coeducation's general pedagogical merits, but they believed sex segregation in the parish's public high schools to be indispensable to white parents' acceptance of integration. As one of the interviewers wrote, Superintendent Bertucci "began by stating that he, in general, approved of mixing the sexes, but . . . [h]e unequivocally feels that separation was

203. *Louisiana: Baton Rouge Desegregated Without Trouble*, SOUTHERN SCHOOL NEWS, Sept. 1963, at 12. Local State Rep. John Rau took a prominent stand against the Civil Rights Act of 1964. *Louisiana: Opposition to Federal Rights Program Increases in State*, SOUTHERN SCHOOL NEWS, Sept. 1963, at 13.

204. *Desegregation Sought in Jefferson Parish*, SOUTHERN SCHOOL NEWS, Aug. 1964, at 4.

205. Brian Thevenot & Matthew Brown, *From Resistance to Acceptance*, NEW ORLEANS TIMES-PICAYUNE, May 19, 2004, at 1. See also *Dandridge v. Jefferson Parish Sch. Bd.*, 332 F. Supp. 590, 593 (E.D. La. Aug. 13, 1971) (Christenberry, J.).

206. Report, American Friends Service Committee, *Almost as Fairly: The First Year of Title IX Implementation in Six Southern States* [hereinafter "AFSC Report"] 94 (1977) (on file with the author).

207. See Education Committee Report, *Re: Coeducation or Sex Segregation in Jefferson Parish Schools* (Nov. 1969) (on file with Newcomb Archives, Newcomb College Center for Research on Women [hereinafter "NCCRW"], Tulane University, Mindy Milam Papers, Box 1—NAC 284); Letter from Edward A. Fontaine, President, Louisiana Federation of Teachers, to G.D. Gregson, President, Jefferson Parish Committee for Better Schools (June 19, 1967) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

208. See 1 RACE REL. L. SURV. 110 (Sept. 1969).

209. The only reference I have found to this demonstration is in a 1969 interview with the Jefferson Parish superintendent of schools. See Joyce Trotter, Interview with Superintendent Bertucci (conducted by Ellen Russell and Joyce Trotter) (Oct. 13, 1969) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

necessary to accomplish racial integration—that it is still necessary for that same purpose—and that it will continue to be necessary for a number of years longer.”²¹⁰ The superintendent was convinced that “white parents would not accept the integration of races and the mixing of sexes at the high school level at the same time,”²¹¹ and warned of a “massive pull-out of white pupils” similar to white flight from neighboring New Orleans should coeducation take place.²¹² Still, he expressed hope that “in ten years we will look back and wonder what the fuss was all about,” and predicted that “Jefferson Parish will be looked upon as a model of successful integration.”²¹³

The superintendent downplayed any detrimental effects of sex segregation on the quality of education. NOW interviewer Joyce Trotter sensed his feeling that “the general behavior and morals of the girls improved,” though he “admitted that boys might be influenced behaviorwise to their betterment by co-education.”²¹⁴ Bertucci sidestepped questions about the comparability of curricular offerings by insisting that “the very numbers of students in each school provides insurance that all necessary courses will be taught in each school.”²¹⁵ School board member Robert Murphy agreed with the superintendent that “[s]eparation was necessary to effect peaceful integration, and is still necessary,” though he too agreed that coeducation was “both less expensive and superior to a system which separates boys from girls.”²¹⁶

In 1969, NOW interviewers noted Superintendent Bertucci’s view that “[t]he time will be ripe for co-ed[ucation] in Jefferson when sufficient new schools have been built to ease . . . overcrowding, and when the emotionalism about desegregation has gone away.”²¹⁷ In 1973, it seemed as if that day had arrived. As overcrowding necessitated the building of new school facilities, an organization called the “Group for Coeducation” pushed for the abolition of sex segregation. In response, the school board considered, and initially accepted, a plan to reinstate coeducation in parish

210. *Id.*

211. *Id.*

212. Education Committee Report, *supra* note 207.

213. Trotter, Interview with Superintendent Bertucci, *supra* note 209.

214. *Id.* An earlier draft of Trotter’s notes described how Bertucci had cited Jefferson Parish’s comparatively low divorce rate as evidence of sex segregation’s possible positive impact.

215. *Id.*

216. Interview with Mr. Robert Murphy, School Board Member (Oct. 23, 1969) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284). On the other hand, at least one member of the board viewed sex segregation as pedagogically beneficial, especially to boys: Paul Pope considered sex-separated high schools “a distinct advantage,” citing “differences in learning ability between high school boys and girls,” and observing that “children . . . compete better against members of their own sex, this being especially true in the case of boys.” Education Committee Report, *supra* note 207. Further, Pope believed there were “fewer disciplinary problems” and “greater participation in school activities” in sex-segregated schools. *Id.*

217. Trotter, Interview with Superintendent Bertucci, *supra* note 209.

high schools.²¹⁸ Outcry over the projected expense caused the board to reconsider, however. Converting to coeducation would involve, among other costs, “building separate restrooms and lockers, revamping curriculum, revising athletic programs and installing home economics facilities in the currently all-male schools and shop equipment in the all-female ones.”²¹⁹ Some community groups opposed coeducation on other grounds, citing potential “discipline problems.”²²⁰ References at one board meeting to boys as “animals that would destroy the girls’ schools” prompted Mrs. Mauna P. Brooke to chide the board for obscuring what she saw as the real impetus for maintaining sex segregation. Financial concerns, she declared, were “nothing more than a smoke screen . . . [T]hese . . . people are not so much concerned with how much in the red the system may be, but how much black is in the system.”²²¹

In the late 1960s and early 1970s, then, conflicts over racial integration and its social implications lurked not far beneath the surface of discussions about reinstating coeducation in Jefferson Parish. But prior to 1974, the possibility that sex segregation might discriminate against girls rarely if ever penetrated the Jefferson Parish debate. Those who argued in favor of coeducation did so on the basis of its general pedagogical superiority and its promotion of “natural” or “healthy” relationships between boys and girls. Partisans of coeducation did not deny that there were significant, and even desirable, differences between the sexes. For instance, E.C. Hunter of Tulane University wrote in a 1963 article frequently cited by proponents of coeducation that significant sex differences existed, not in “average intelligence,” but in “physiological and social maturation,” “interests and attitudes involving sex consciousness,” “in the interests, occupations and pursuits which become culturally sex differentiated,” and in “activities where strength, energy, and emotional steadiness are involved.” He insisted, however, that “[t]hese differences, large or small, do not justify

218. Ira Harkey III, *Change Policies, Jeff Board Told*, NEW ORLEANS STATES-ITEM, Feb. 8, 1973 (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284); *Jeff Parish High Schools Going Coed Once Again*, NEW ORLEANS TIMES-PICAYUNE, Jan. 15, 1973, §1, at 18.

219. *Sex Separation Suit Promised*, NEW ORLEANS TIMES-PICAYUNE, May 5, 1974, §1, at 20.

220. The Metairie Woman’s Club cited the “very few disciplinary problems with the present system,” and expressed the belief that “there would be innumerable difficulties if the high schools revert to co-education.” Mrs. Edward Groner & Mrs. E.J. Lacombe, Letter to the Editor, *Against Jeff Co-Education*, NEW ORLEANS TIMES-PICAYUNE, Jan. 14, 1973, §2, at 3. The Harahan Board of Alderman agreed, calling the capital improvements that would be required an “unneeded expense.” Emile LaFourcade, Jr., *Harahan Board Opposes Sex Integration in Schools*, NEW ORLEANS TIMES-PICAYUNE, Feb. 2, 1973, §1, at 9.

221. Fred Barry, *Jefferson Board Tables Coed Vote*, NEW ORLEANS TIMES-PICAYUNE, Feb. 8, 1973, §1, at 3. Mrs. Brooke said, “I find it ironic that the many who have been deaf and blind for at least the last five years to the desperate need for monies for both the operation and construction of schools are suddenly and acutely aware of the lack.” *Id.* A local women’s magazine raised similar questions, noting that despite the passage of a thirty-seven million dollar bond issue for public education, “the schools remain segregated by sex. It appears that money is not the basic issue.” M.G., *School Segregation Challenged*, DISTAFF, Dec. 1974, at 4 (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

separate schools for boys and girls,” although separate classes for subjects like science, home economics, shop, and physical education remained appropriate.²²² Hunter also argued that “coeducation . . . is essential to good heterosexual adjustment.”²²³ Indeed, coeducation proponents during this period often cast sex segregation as “unnatural” and “unhealthy.” Louisiana Federation of Teachers President Edward Fontaine, writing in 1967, excoriated the “unnatural and, for mid-twentieth century America, unprecedented, separation of boys and girls,” arguing that “the school environment should mirror the actual environment boys and girls will have to adjust to in adult life.”²²⁴ Ralph Past, chairman of the Group for Coeducation echoed this sentiment several years later: “Coeducation would be a great boost to public education and the students. Youth would be afforded a healthy, natural male-female environment,” he told the *New Orleans States-Item* in 1973.²²⁵

The lawsuit filed in 1974 dramatically shifted the terrain of contestation. In contrast to the earlier debates and litigation over *Jane Crow*, *Helwig v. Jefferson Parish School Board* cast sex segregation primarily as sex discrimination, and only secondarily as race discrimination. Implicitly, the case challenged the efficacy of the racial motivation standard, which asked whether a sex segregation scheme was motivated by “racial discrimination” or by legitimate “educational purposes,” including educational benefits to boys, sex-based disparities in curricular interests, and discipline problems allegedly inherent in coeducation. The *Helwig* plaintiffs in effect attacked the very legitimacy of these educational purposes, a legitimacy assumed by courts that had considered *Jane Crow* arrangements in the past. Rather than asserting that sex segregation was merely “racial segregation by subterfuge,” as the Concordia Parish plaintiffs had argued a few years earlier, the plaintiffs in *Helwig* contended that sex segregation was *like* racial segregation, inflicting harm on girls comparable to that imposed on black children by *Jim Crow*.

The plaintiffs in *Helwig* were a girl and a boy, represented by local ACLU attorney Jack Peebles, who argued that sex separation harmed female students and ran afoul of the Supreme Court’s new constitutional sex equality jurisprudence.²²⁶ They contended that sex segregation in

222. E.C. Hunter, *Coeducation in Public High Schools*, LOUISIANA SCHOOLS, May 1963, at 13, 54.

223. *Id.* at 14. Hunter continued:

[T]hose who make this adjustment succeed better in their relations with the opposite sex in adult life and in marriage It would appear that nearly everyone now has come to accept the idea that if positive heterosexual attitudes and behavior adjustments are to be promoted, boys and girls must be encouraged to be together in work and in play with arbitrary restrictions reduced to a minimum.

Id.

224. Letter from Fontaine to Gregson, *supra* note 207, at 1.

225. Harkey, *supra* note 218.

226. The purpose of having a male student among the plaintiffs apparently was to represent the freedom of association claim. Attorney Peebles had hoped to find a black child to protest the racial

public high schools was “inherently discriminatory toward women,” presented sociological and psychological data to support the conclusion that separation inculcated feelings of inferiority, and enlisted extensive testimony from Melvin Gruwell, a Tulane University professor, to that effect.²²⁷ Gruwell also asserted that sex separation resulted in material inequities of opportunity for young women, arguing that curricular and counseling disparities steered girls in single-sex schools toward certain fields of study and away from traditionally male careers.²²⁸ Indeed, testimony offered by school superintendent Larry Sisung revealed that advanced math, science, and Latin courses, as well as shop and other traditionally male vocational training, were offered to boys but not to girls.²²⁹ In addition to using social science evidence and *Brown*’s “inherently unequal” language, Peebles relied on the recently decided *Frontiero v. Richardson*, in which a plurality of the Court had accepted a race-sex analogy for purposes of scrutinizing laws that classified individuals on the basis of sex.²³⁰ According to the plaintiffs, sex segregation was wrong because it harmed girls, materially and psychologically, in much the same way that racial segregation injured African American children.

The *Helwig* plaintiffs used sex discrimination arguments not only out of expedience; they conceived of their case as part of a larger struggle for women’s rights. Peebles told a local reporter that the suit stemmed from research by the ACLU Women’s Rights Project.²³¹ Kathleen Helis, mother of plaintiff William Helis, served as education chairman of the local League of Women Voters chapter, which announced its support for coeducation in May 1974,²³² on the ground that “sex segregation in the schools perpetuates discrimination in job opportunities.”²³³ The *Helwigs* and the *Helises* also invoked Title IX’s prohibition on sex discrimination in education. Shortly after filing suit, they wrote to the Office for Civil

motivations behind Jane Crow, but in the end, both plaintiffs were white. See Barry W. Zander, *Jeff Schools May Be Target of Injunctions*, EAST BANK GUIDE (1974) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284); Susan Finch, *Sex Segregation Target of Jeff Suit*, NEW ORLEANS STATES-ITEM, July 28, 1974.

227. Complainant’s Memorandum, *Helwig v. Jefferson Parish Sch. Bd.*, quoted in AFSC Report, *supra* note 206, at 100.

228. *Id.*

229. *Id.* at 99-100. Itemized estimates of the cost of converting to coeducation reveal the material differences between the boys’ and girls’ facilities: where girls’ schools had food preparation, sewing, and stenography labs, boys’ campuses instead featured industrial arts buildings, chemistry, biology, and electrical labs, mechanical drafting stations, and athletic equipment. See Letter from Jack A. Grant to Jack Peebles, Re: Coeducational School System (Sept. 13, 1974) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

230. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

231. Zander, *supra* note 226. It appears that research conducted by one of Ruth Bader Ginsburg’s students at Columbia Law School led the organization to investigate Jefferson Parish as a possible test case. See *id.*

232. Barry W. Zander, *Board Opts for ‘Priority Projects’ Rather Than Coeducation in Autumn*, EAST BANK GUIDE, May 8, 1974, § 1, at 4; Finch, *supra* note 226.

233. Finch, *supra* note 226.

Rights (OCR) to request an investigation of Jefferson Parish for possible Title IX violations in the maintenance of separate schools for male and female students.²³⁴ Regional education chief John A. Bell replied that Title IX guidelines had not yet issued, and that in the interim, his office could only intervene where there was clear evidence of educational disparities.²³⁵ Peebles immediately responded, sending Bell the Sisung interrogatories, whose answers revealed curricular discrepancies between the boys' and girls' schools.²³⁶

Women's rights advocates received unsatisfying responses from the government and from parish school officials. It was not until 1976 that a Title IX coordinator began to monitor Jefferson Parish schools.²³⁷ In that year, a report by Jefferson Parish NOW's Education Task Force announced the organization's intention to "make the public aware of what is happening in the schools," through a campaign that included "a formalized program of slide shows and speakers to appear in schools and to parent-teacher groups" to "help to raise consciousness levels and help combat old, out-moded ideas about educational differences between the sexes." "Girls," the report declared, "must be offered professional training as well as boys. They must have viable career alternatives presented to them to allow for emotional and economic independence instead of being locked into a life of total dependence."²³⁸ In an attempt at Title IX compliance, the school district officially made all course offerings available to all students, but girls had to travel to boys' schools and vice-versa in order to avail themselves of non-traditional curricular options.²³⁹

234. Letter from James & Mary Kathleen Helis to Dr. John A. Bell, Chief, Education Branch, Region 6, Office for Civil Rights (Sept. 18, 1974) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284); Letter from Jeanne & Carl Helwig to Dr. John A. Bell (Sept. 19, 1974) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

235. Letter from John A. Bell to Mr. & Mrs. James Helis (Oct. 31, 1974) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284); *see also* Letter from John A. Bell to Alexander C. Ross, Chief, Education Section, Civil Rights Division, Department of Justice (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

236. Letter from Jack Peebles to John A. Bell (Nov. 6, 1974) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

237. Sexism in Education Task Force I (1976) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284).

238. *Id.* at 2-3.

239. *See id.* at 3 ("Supposedly all courses are offered to all students in the system, but transportation is still a major factor in who takes what."); *see also* Memorandum from Elaine W. Duvic to Faculty Members (Apr. 20, 1976) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284) (announcing new policy to effect that "[a]ll students in the parish and their parents must have the same course information Electives will be taught where there is a demand and where the teacher quota allows No teacher is to attempt to influence a student against any course.").

Three years after the *Helwig* lawsuit first was filed,²⁴⁰ Jeanne Helwig, the mother of plaintiff Kenlee Helwig and a member of NOW, wrote to the *New Orleans Times-Picayune* to argue that the continued sex segregation of Jefferson Parish students demonstrated the dire need for an Equal Rights Amendment.²⁴¹ “Girls,” she charged, were “steered into traditional home economics and secretarial courses while the boys were offered mechanical drawing, drafting, architecture, advanced math II and advanced Latin. Is it any wonder that 62.7% of the girls do not go to college?”²⁴² Ms. Helwig also lamented the lack of “real world” socialization under sex segregation, and argued that since there was “little opportunity for students to meet persons of the opposite sex in socially acceptable situations,” parents

should not be surprised to find their children latching on to the first person they meet of the opposite sex and hanging on to them for four years. Nor should they be shocked at the natural consequences of this situation, which manifests itself in early marriages and tragic unplanned pregnancies.²⁴³

Moreover, Helwig wrote, her daughter had graduated without receiving relief—or any word at all—from the three-judge district court to which the plaintiffs had petitioned. “It is hard now to convince our daughter that justice is available if one asks for it [O]ur healthy, normal daughter now has a four-year handicap to deal with—simply because she was born female.”²⁴⁴

C. “A Parallel Between Racial and Sex Segregation”: The AFSC Report

From 1974 on, legal advocates who opposed Jane Crow increasingly emphasized its sex discriminatory aspect, focusing on psychological and material harm to girls—injuries they often compared to the iniquities of racial segregation. As we saw in the previous section, the *Helwig* case presented just such a sex discrimination argument. The most comprehensive critique of sex segregation as a form of sex discrimination parallel to Jim Crow came in a 1977 report by the American Friends Service Committee (AFSC) on Title IX implementation in Southern public

240. New plaintiffs filed substantially the same suit in 1976, fending off mootness when the original plaintiffs graduated. See *Suit Attacks Jeff Non-Coed School Setup*, NEW ORLEANS TIMES-PICAYUNE, July 20, 1976, §1, at 1. The new plaintiffs were Mr. and Mrs. Frederic S. Anderson, on behalf of their daughter Nancy, and Else Peters Tracy, mother of Laura. See also Letter from Jack Peebles to Judge Jack M. Gordon (Oct. 31, 1975) (Newcomb Archives, NCCRW, Tulane University, Mindy Milam Papers, Box 1—NAC 284) (expressing the Helwigs’ and Helises’ concern that their case would be become moot if the court did not soon render a decision).

241. Jeanne Helwig, Letter to the Editor, *Artificial Segregation*, NEW ORLEANS TIMES-PICAYUNE, Mar. 19, 1977, §1, at 16.

242. *Id.*

243. *Id.*

244. *Id.*

schools.²⁴⁵ The AFSC, which had long been involved in local and regional civil rights struggles, had formalized its anti-sex discrimination activities in a Title IX compliance program at around the same time that the ACLU's Peebles filed the *Helwig* suit.²⁴⁶ The report, funded by a Ford Foundation grant, reflected more than a year of monitoring by AFSC's Southeastern Public Education Program in six states—Alabama, Arkansas, Georgia, Louisiana, Mississippi, and South Carolina—and was styled as a formal complaint to the Office for Civil Rights. Local and national chapters of organizations including the League of Women Voters, the American Association of University Women, NOW, the Council of Jewish Women, the Louisiana State Bureau on the Status of Women, the ACLU, and the Lawyers' Committee for Civil Rights Under Law assisted the AFSC with the monitoring project. Monitors distributed detailed questionnaires to students, teachers, parents, administrators, coaches, guidance counselors, athletic instructors, Title IX compliance officers, and community members, in twenty-one school districts.²⁴⁷

In addition to detailing violations in curriculum, school policies, athletics, and employment, the report devoted a chapter to districts that still maintained sex-segregated schools and made the "firm contention" that HEW "should not allow these schools to exist."²⁴⁸ The "requirement of comparable programs and services," like *Plessy*'s "separate-but-equal" standard, "does not diminish the effects of inequalities in such schools," the AFSC Report concluded. Merely enforcing Title IX's requirement of comparable programs and services could not obviate the simple truth: "Separate can never be equal."²⁴⁹

The AFSC report drew an extended and deliberate "parallel between racial and sex segregation,"²⁵⁰ comparing single-sex schools to the "freedom-of-choice" desegregation plans of the 1960s. "Sex discrimination will never be abolished so long as the burden of equality of opportunity must be borne by the recipients of discrimination," the authors argued.²⁵¹ "As in racial desegregation, the test of a [compliance] plan must be whether or not it works."²⁵² The report quoted extensively from Peebles' briefs in the *Helwig* case, which relied heavily on a race-sex analogy. The authors emphasized the disparities in curricular and extracurricular offerings at the single-sex schools in two Louisiana

245. AFSC Report, *supra* note 206.

246. Background Paper for Regional/National Task Force (1976) (on file with American Friends Service Committee Archives [hereinafter "AFSC Archives"], CRD 1976: Education Program #2, Folder: Regional Offices: SERO—SEPEP Administration).

247. Handbook for Title IX Monitoring, 1976, Southeastern Public Education Program, AFSC, Atlanta, Georgia (AFSC Archives, CRD Education Program 1976 #3, Folder: Regional Offices: SERO—SEPEP Projects—Sex Discrimination Project).

248. AFSC Report, *supra* note 206, at 93.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at Recommendations.

parishes and in Amite County, Mississippi. Similar patterns emerged in each of the districts: courses in subjects like engineering, advanced mathematics, physics, Latin, vocational agriculture, ROTC, and industrial arts would only be offered at the boys' schools, while home economics and secretarial skills were emphasized at the girls' schools and unavailable to boys.²⁵³ In Tangipahoa Parish, there allegedly was "unanimous agreement among principals, teachers, parents and students that texts were sex stereotyped and biased."²⁵⁴ Monitors also cited vast disparities in athletic programs, with girls' coaches earning just twenty percent of the salaries received by the coaches of boys' teams.²⁵⁵ In Jefferson Parish, they alleged, girls' schools had no gymnasium and no buses to transport them to athletic events.²⁵⁶ The Amite County school system, monitors concluded, was in noncompliance with Title IX in every way possible.²⁵⁷

On the eve of the monitors' arrival, some schools instituted "last minute plan[s] to equalize curricula," but the monitors found that "everything possible was being done to subtly and indirectly discourage students and teachers from following any non-traditional courses of action."²⁵⁸ Often the proposed solution was to bus students from one school to another to partake of courses not offered on their own campuses. The report quoted a female student as saying, "My teachers said it's silly to want to take a boy's course like mechanical drawing, but I still want to. Taking the bus (to the boys' school) is complicated, though—so maybe I won't."²⁵⁹ Like African American children victimized by Jim Crow, girls, the AFSC report suggested, bore the brunt of Jane Crow's complications. Moreover, like the victims of Jim Crow, "[f]emale students interviewed repeatedly expressed feelings of vague inferiority, unease at their segregated status, apprehension about their future."²⁶⁰ Sex separation, as the *Helwig* plaintiffs' brief contended, was "a badge of inferiority which must be borne by women."²⁶¹

Significantly, these sex discrimination arguments precipitated a shift in the arguments marshaled by Jane Crow's defenders. Now school officials

253. See also *Bias in Schools Target in Jeff*, NEW ORLEANS TIMES-PICAYUNE, Jan. 10, 1974, § 1, at 10 (reporting that attorney Jack Peebles submitted to federal district court evidence that "male students are treated differently from the female students by way of curriculum and activities").

254. AFSC Report, *supra* note 206, at 108.

255. *Id.* at 98.

256. *Id.* The Jefferson Parish School Board's vice president denied that the girls' school's athletic facilities were inferior, or that girls were forbidden to take industrial arts courses and boys to take home economics. *Sex Bias Report Blasted*, NEW ORLEANS TIMES-PICAYUNE, June 2, 1977, §1, at 12.

257. AFSC Report, *supra* note 206, at 109.

258. *Id.* at 96. The report detailed the difficulties monitors encountered when they attempted to gather information on single-sex schools—recalcitrant school officials, intimidated teachers, elusive documentation. "Particularly reticent," according to the monitors, were black teachers who feared they would lose promotion opportunities, be denied tenure, or even lose their jobs, if they expressed their objections to sex segregation. *Id.* at 95.

259. *Id.*

260. *Id.* at 94.

261. *Id.* at 101.

began to argue that single-sex education benefited girls, giving them greater opportunities to assume leadership roles in the classroom and in extracurricular activities. The AFSC report discounted this possibility, arguing that “expectations for women” in single-sex schools “reinforce attitudes of female inferiority.” Even if “a female in a sex-segregated situation has more opportunity to become school president—the election to school office hardly equates with one’s life chances to become a scientist.”²⁶² Still, this mode of argumentation on the part of school officials marked a significant shift in emphasis on the part of sex-segregation proponents. Boys’ fragile gender identities and special educational needs were no longer the focus of attention. If plaintiffs were speaking in terms of girls’ subordination, then school districts seeking to maintain sex separation policies had to respond in kind with arguments that emphasized how single-sex education benefited girls. To feminists, this was merely the old wine of subordination in new bottles deceptively labeled “empowerment.”

Sex discrimination arguments had transformed Jane Crow discourse. A practice whose harm seemed to consist primarily in its racial implications now appeared to inflict a particular injustice on girls. Sex-specific curricula that dictated the placement of girls in home economics and clerical courses and boys in vocational and industrial education, and in advanced math and science courses, had once seemed a benign and even salutary reflection of social reality. Now such customs were recast as a denial of equal opportunity that injured female students. Separating pupils by sex, a practice previously considered harmless and even healthy, now was deemed a “badge of inferiority” that psychologically and materially damaged girls just as Jim Crow had degraded African American children.

IV. JANE CROW’S STRANGE CAREER: THE LIMITATIONS OF THE LAW

Parts I-III detailed the transformation in legal discourse from pre-*Brown* analogies between the legitimacy of sex separation and the constitutionality of racial segregation, to post-*Brown* enthusiasm for sex segregation as a palliative for white Southern fears of “amalgamation,” to late-1960s concerns with racially discriminatory motivation, to the 1970s emergence of a sex discrimination paradigm that drew an analogy between the unconstitutionality of racial segregation and the illegitimacy of sex segregation. Part IV explores some of the limitations of this evolving body of legal arguments, discussing how neither the racial motivation standard nor the sex discrimination paradigm fully captured what was at stake for African American communities in sex-segregated school districts.

Two legal paradigms were available to Jane Crow’s challengers by the early 1970s. The racial motivation standard, in theory, asked whether

262. *Id.* at 97.

“racial discrimination” or “educational purposes” underpinned sex segregation. As we have seen, that standard helped some African American communities effectively dismantle Jane Crow through vocal opposition in and out of court. But in many school districts, the racial motivation standard allowed school boards to disguise their motives in race-neutral language: the standard encouraged them to speak in terms of benefit to boys, sex differences, and “discipline problems.” As this Part suggests, though, the motivations underlying sex segregation may have been less important than the circumstances under which sex segregation was implemented. In Taylor County, Georgia, where whites kept their children and tax dollars in the public schools, and where African American teachers and administrators held positions of responsibility alongside their white colleagues, African Americans overcame their initial opposition to Jane Crow. In contrast, in Amite County, Mississippi, where many whites withdrew their students and financial resources from the schools, and where whites retained almost total control over school administration, African Americans’ discontent with sex segregation only increased. Even so, the evolving legal discourse did not capture what black families saw as the primary problems with sex segregation. A sex discrimination argument based upon an analogy to racial segregation proved ill-equipped to express what Jane Crow meant to Amite County African Americans.

A. “To Minimize the Problems People Have Adjusting”: Taylor County’s Pragmatic Trade-off

Many African Americans perceived sex segregation as an affront to their dignity: in the words of the Concordia Parish plaintiffs’ attorney, they saw Jane Crow as “perpetuat[ing] racial segregation by subterfuge.”²⁶³ C.J. Duckworth, executive secretary of the Mississippi Teachers Association, an African American group, similarly declared in 1970, “Sex segregation is a damned clear way of telling our people that they are inferior to whites.”²⁶⁴ As we saw in Part II, some judges measured racially discriminatory motivation according to African Americans’ perceptions of its purpose and effect.²⁶⁵ As implemented by judges sympathetic to their indignation, the racial motivation standard was responsive to what many African American communities viewed as the primary harm of sex segregation.

263. Brief of Appellants at 9, *Smith v. Concordia Parish Sch. Bd.*, No. 28342 (5th Cir. Oct. 1, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4235, 28342-28349).

264. Tom Herman, *Evasive Action: Schools in Deep South Slow Integration Tide with Subtler Tactics*, WALL ST. J., Oct. 15, 1970, at 1. Duckworth was ambivalent about the legality of sex segregation. See *supra* note 170.

265. *McFerren v. Fayette County Bd. of Educ.*, No. C-65-136 (W.D. Tenn., Dec. 10, 1969), quoted in *Order*, *United States v. Lincoln County Bd. of Educ.*, Nos. 1400 and 1420, at 3 (S.D. Ga. Apr. 27, 1970) (Library of Congress, Records of the NAACP, V:2819, Folder: Schools: Georgia, Legal Cases, 1970-1978).

The racial motivation standard had limitations, however, both in terms of the realities of its selective judicial application and in its ability to capture how some black communities came to view Jane Crow. Some courts “pretermitted” the sex segregation question pending the achievement of a racially unitary school system; others allowed school districts to justify separating the sexes for “educational purposes,” variations permitted by the standard’s indeterminacy. Moreover, in school districts that implemented sex separation plans, the longer-term reactions of different communities varied significantly. This section examines Jane Crow’s career in Taylor County, Georgia, where, despite their initial opposition to sex segregation, African American families and school officials eventually proved willing to accept separate schools for the sexes. In exchange for this concession, African Americans expected genuine racial desegregation, commitment by whites to remain in and financially maintain the public schools, and significant black leadership in the racially integrated single-sex schools.

Taylor County was a small, relatively poor, rural farming community of less than ten thousand residents, approximately half white and half black. The county had a long history of anti-black violence, most infamously, the murder of Malcolm X’s father, an itinerant minister who espoused the radical views of Marcus Garvey, in the 1920s.²⁶⁶ As in most Southern school districts, the “freedom of choice” policy of the mid- to late-1960s resulted in almost no desegregation,²⁶⁷ and the integration that did occur was prompted by federal threats to withdraw funding.²⁶⁸ Federal ultimatums ordering massive desegregation in the summer and fall of 1969 did not inspire action, despite the withdrawal of funding. But a December 1969 federal court order enjoining the Georgia Department of Education from financing still-segregated schools forced the local board to develop a plan for racial integration.²⁶⁹ White school officials continued to resist; they submitted another freedom-of-choice plan to the court and sought an injunction to prevent the federal government from ordering

266. STEPHEN G.N. TUCK, *BEYOND ATLANTA: THE STRUGGLE FOR RACIAL EQUALITY IN GEORGIA, 1940-1980*, at 22 (2001). African American efforts at enfranchisement later in the century also met with violence. For instance, Macio Snipes, a young black veteran of World War II, was murdered on his porch in Taylor County by ten white men, three days after voting in the 1946 primary election. *Id.* at 71.

267. The term “freedom of choice” refers to desegregation policies that nominally allowed students and their parents to choose between formerly all-white and formerly all-black schools. In practice, these policies allowed a few intrepid African Americans to attend formerly white schools, but they resulted in, at most, only token desegregation.

268. Brief for the United States at 18-19 & n.18, *United States v. Georgia*, No. 71-2563 (5th Cir. Sept. 3, 1971) (NARA, S.W. Reg. Div., Fifth Circuit, Case Files, Box 6148, 71-2563—71-2569; Brown, *supra* note 90, at 86. Based on interviews with Taylor County residents, conducted in the early 1990s, Brown suggests that many African American parents were reluctant to send their children to white schools, both because they feared unfair treatment and even violence, and because they worried that integration would sever the strong ties between black schools and the black community. *Id.* at 88.

269. *Id.* at 99.

further desegregation.²⁷⁰ When integration appeared inevitable, however, the school board voted to convert the black elementary and secondary schools into boys' campuses and to reopen the two white schools as girls' domains.²⁷¹ In April 1970, the federal courts approved six Georgia plans involving sex segregation.²⁷² The courts' application of the Fifth Circuit's racial motivation standard focused on results rather than intent. Their review of the plans had "not indicated that the assignments based on sex produced educationally unsound consequences or inequities resulting in racial discrimination."²⁷³

The reaction of Taylor County's African Americans was similar to that of many other black communities faced with the prospect of replacing Jim Crow with Jane. Students staged protests and a boycott, emphasizing their concern that black teachers and administrators would lose their jobs as the schools desegregated.²⁷⁴ African American plaintiffs (unsuccessfully) sought a hearing on whether sex separation constituted race discrimination, and persuaded the federal government to intervene on their behalf.²⁷⁵ When the *Christian Science Monitor* reported on Taylor County's desegregation experience in 1972, both black and white students complained about sex separation.²⁷⁶ But overall, officials and community leaders of both races deemed sex segregation a qualified success. Black high school principal Albert O'Bryant told the *Monitor* that while the sex-segregated arrangement "left something to be desired," it was a policy that "seemed to minimize the problems that people have adjusting" to racial desegregation.²⁷⁷ As such, he and other African Americans apparently were willing to accept Jane Crow as a condition of successful racial integration: sex segregation remained in place in Taylor County until 1978.²⁷⁸

Three related factors distinguished Taylor County from other school districts where African Americans' resentment toward Jane Crow persisted or intensified during the 1970s: continuing white presence in the public schools, financial commitment to those schools, and opportunities

270. *Id.* at 102.

271. *Id.* at 102-03.

272. Order of the Court, *Georgia*, No. 71-2563 (N.D. Ga. Apr. 21, 1970), *quoted in* Brown, *supra* note 90, at 106 n.11. The six plans involved Pelham city, and the counties of Baker, LaGrange, Lamar, Meriweather, and Miller. *See id.*; *see also* 2 RACE REL. L. SURVEY 54 (July 1970).

273. Order of the Court, *Georgia*, No. 71-2563 (N.D. Ga. Apr. 21, 1970), *quoted in* Brown, *supra* note 90, at 106 n.11; 2 RACE REL. L. SURVEY 54 (July 1970). At the time of the court's ruling, Taylor County was listed as one of about a dozen counties in non-compliance with desegregation orders. *See id.*

274. Brown, *supra* note 90, at 106.

275. *See* Brief for the United States, *Georgia*, No. 71-2563 (5th Cir. Sept. 3, 1971) (NARA, S.W. Reg. Div., Fifth Circuit, Case Files, Box 6148, 71-2563—71-2569); Brief for Private Appellants, *Georgia*, No. 71-2563 (5th Cir. Sept. 7, 1971) (NARA, S.W. Reg. Div., Fifth Circuit, Case Files, Box 6148, 71-2563—71-2569).

276. Dillin, *supra* note 114, at 1, 10.

277. *Id.* at 10.

278. Brown, *supra* note 90, at 113.

for black leadership in the integrated school system. Stanford Maxwell Brown's comparative study of desegregation in Taylor and Baker Counties reveals that in Baker County, where whites fled the public schools after desegregation was enforced and devoted monies to establishing private all-white academies, sex segregation lasted only one year. In Taylor County, by contrast, white citizens kept their children and their tax dollars in the public schools. Also, Taylor County's desegregation plan, unlike Baker County's, divided administrative positions equitably between black and white educators. Black Principal O'Bryant headed one of the boys' schools, joined by a white assistant principal, while Mrs. Jewel McDougald, an African American teacher, became principal of one of the girls' schools. The other boys' school, headed by a white principal, gained a black assistant principal.²⁷⁹ Almost all of the teachers of both races kept their jobs in Taylor County, whereas many black teachers in Baker County were forced out and white teachers defected to the private "seg academies."²⁸⁰ The balanced racial composition of the Taylor County public schools held steady throughout the sex segregation period and beyond.

Taylor County's African Americans did not hesitate to stand their ground and insist upon racial equality in the newly integrated school system. When white school officials decreed that only white drivers could transport girls on schoolbuses, while black drivers could transport boys, black families launched a boycott in the spring of 1971, keeping one-third of the district's students out of school for more than two weeks.²⁸¹ The list of demands black leaders presented to the county's school superintendent included amnesty for students who participated in the boycott, assignment of drivers to buses without regard to race, abolition of race-based seating assignments, and "humane treatment" for all student bus-riders.²⁸² "All we really want is equal opportunity for our bus drivers," boycott spokesperson Sara Mathis told the *Atlanta Constitution*. "What they are really saying is

279. *Id.* at 108.

280. *Id.*

281. Tom Linthicum, *Taylor Blacks Extend School Buses Boycott*, ATLANTA CONSTITUTION, Apr. 27, 1971 (Library of Congress, Records of the NAACP, V: 2819, Folder: Schools: Georgia, Correspondence, 1965-71). See also Letter from Rufus Huffman to Norman Carter, Taylor County School Superintendent, Butler, Georgia (Apr. 27, 1971) (Library of Congress, Records of the NAACP, V: 2819, Folder: Schools: Georgia, Correspondence, 1965-71) ("Please be advised that [the NAACP] has been informed of your school bus transportation arrangement, which is that white girls are only transported on buses that are driven by white persons and black boys are only transported on buses that are driven by black persons The NAACP is concerned and appalled when supposedly sane individuals, especially school officials, demonstrate their bigotry and racism by inflicting injustices or allowing injustices to be inflicted upon individuals and especially students."); Letter from Norman Carter to Rufus Huffman, Education Field Director, Tuskegee Institute, Alabama (Apr. 29, 1971) (NAACP Papers, V: 2819, Folder: Schools: Georgia, Correspondence, 1965-71) ("Please be advised that all girls, black and white, are transported by white drivers; and that all boys, black and white, are transported by black drivers. The Taylor County Board of Education gives all drivers the authority to assign seats when in the judgment of the driver this is necessary to maintain order on the buses.").

282. Linthicum, *supra* note 281.

that black drivers aren't good enough to drive white girls to school. Our children won't go back to school until our drivers get equal opportunity."²⁸³

The community's steadfastness on the bus-driver issue suggests that African Americans were not simply cowed into accepting sex segregation, but rather that they made a conscious decision to trade Jim Crow for Jane. The calculation implicit in this trade-off suggests the complexity of "racial motivations" at work in the Jane Crow cases. On the one hand, sex separation unquestionably reflected invidious beliefs about the dangers and evils of "race-mixing" and "amalgamation" that perpetuated the racial and sexual stigmas of Jim Crow. On the other hand, to the extent that sex separation fulfilled its promise of stemming white flight to private schools and the withdrawal of tax revenues from public education, Jane Crow could function as an effective transitional measure, easing a path to racial integration that few communities traversed successfully.

B. "We Don't Live in a Sexually-Segregated World": Amite County Confronts Jane Crow

Jane Crow had a much more troubled career in Amite County, Mississippi, despite the area's demographic similarities to Taylor County, Georgia. Like Taylor, Amite was a rural, relatively poor county of less than fifteen thousand residents, approximately half black and half white, with a lengthy history of racial violence and oppression.²⁸⁴ But unlike Taylor County whites, Amite County's white citizens left the public schools in large numbers, withdrew financial resources from the public schools, and maintained a stranglehold on power within the school district administration.²⁸⁵ Amite County African Americans' discontent with sex separation only increased over the course of the 1970s, culminating in a month-long boycott of the public schools in the fall of 1977. As this section describes, neither the racial motivation standard nor a sex discrimination argument based upon an analogy to race fully captured the objections of Amite County's African American community to sex segregation.

Sex separation in Amite County began in much the same way as it did in many other Jane Crow school districts. In late 1969, after a Fifth Circuit panel ordered Amite County to implement the desegregation plan proposed by HEW, the school district moved to amend HEW's plan in order to permit the separation of children by sex in grades one through

283. *Id.*

284. John Dittmer calls mid-1960s Liberty, Mississippi, the county seat, an "embattled outpost" of the civil rights movement. JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 280 (1994). Amite County had been the site of a number of brutal murders of African Americans by whites, including the slaying of Herbert Lee by state legislator E.H. Hurst in 1961, and the subsequent murder of Louis Allen, a witness to that shooting, in 1964. *Id.* at 215.

285. In the immediate aftermath of desegregation, almost all of Amite County's white parents withdrew their children from the public schools. *See infra* note 288 and accompanying text.

twelve. Notably, the four African American members of the court-mandated biracial review committee signed an affidavit memorializing their unanimous approval of the sex separation scheme.²⁸⁶ The Fifth Circuit panel approved this modified plan as an "interim emergency measure," noting that its long-term validity depended upon the school district's intent. The panel ordered the district court to investigate whether racial discrimination or educational purposes motivated the sex segregation plan.²⁸⁷ Meanwhile, most of Amite County's white parents withdrew their children from the public schools in late 1969 and early 1970, enrolling them in hastily created private academies.²⁸⁸

In June 1970, the U.S. District Court for the Southern District of Mississippi held a hearing at which Annie Andrews, the Amite County superintendent of schools, was the sole witness. In light of the evidence, Chief Judge Dan M. Russell, Jr. concluded that "the separation by sex plan stems from sound educational purposes as distinguished from racially discriminatory purposes."²⁸⁹ Judge Russell found that the sex separation had produced a racially unitary school system, that male students' academic performance and leadership qualities had improved substantially, that disciplinary problems had declined, and that the "stability of the entire school operation under the modified plan resulted in increased attendance by white students and in better cooperation of the community as a whole."²⁹⁰

286. Motion of Defendants-Appellees for Approval of Amended Desegregation Order as Approved by Bi-Racial Committee, *United States v. Amite County Sch. Dist.*, Nos. 28030 & 28042 (5th Cir. Nov. 28, 1969) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Box 4163, Nov. 1969 (pt.-March 1970). For a discussion of the use of biracial committees in Mississippi, see BOLTON, *supra* note 29, at 195-98. The circumstances under which the African American committee members approved Amite County's sex separation plan are not entirely clear. Minutes of the committee meeting submitted by the school district to the court indicate that a number of community members appeared at the meeting to express their opinions, but were asked to leave. One of the five African American committee members tendered his resignation before the meeting began, so that white members were in the majority when the vote on sex segregation was taken. The minutes do not record any objections to the plan. See Exhibit "A," Recess Meeting, Nov. 26, 1969, appended to Motion of Defendants-Appellees, *supra*.

287. *Quoted in United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 621 (5th Cir. 1977). See also 1 RACE REL. L. SURVEY 253 (Feb. 1970) ("The court expressed some reluctance to approve the change without hearing to determine whether the board's request was motivated by racial discrimination or by bona fide educational considerations.").

288. See James T. Wooten, *Exodus Seen as Threat to the System on Eve of Integration Move*, N.Y. TIMES, Jan. 5, 1970, at 1 (reporting that nine hundred white students in Amite County had enrolled in a segregated private academy); Roy Reed, *Both Sides in South Mistrust Nixon Actions on School Integration*, N.Y. TIMES, July 16, 1970, at 22 (stating that eighty-eight percent of Amite's white students had left the public schools).

289. *Quoted in Hinds County*, 560 F.2d at 621. Civil rights attorney Fred Banks remembers the Southern District of Mississippi, where Judge Russell sat, as being particularly resistant to school desegregation, in contrast to the Northern District, which included Judge Keady, discussed *supra* note 135. See Fred L. Banks, Jr., *The United States Court of Appeals for the Fifth Circuit: A Personal Perspective*, 16 MISS. COLL. L. REV. 275, 278 (1996). The United States Courthouse in Gulfport, Mississippi is now named for Judge Russell.

290. *Hinds County*, 560 F.2d at 621 n.3.

But almost from the start, some African American families had expressed displeasure with the Amite County sex separation plan. In 1969, an advisory committee of African Americans, headed by the prominent educator Roosevelt Steptoe, formed to protest sex segregation.²⁹¹ In August 1970, more than 300 black parents signed a petition “express[ing] opposition to the plan of desegregation presently in force in Amite County. Separation of children by sex is but another way to keep our children segregated and but another example of white resistance and opposition to integration,” the petitioners declared.²⁹² The NAACP Legal Defense Fund filed a successful motion to supplement the court record, but received no other response to the parents’ petition from the court.²⁹³ Rufus C. Huffman, educational director for the NAACP’s Special Contribution Fund, communicated African Americans’ grievances in a letter to NAACP Legal Defense Fund attorney Mel Leventhal in October. African American parents were disturbed that sex segregation limited their children’s curricular choices: “[T]here are some boys who desire to take Home Economics and some girls want some vocational training, but they are denied this opportunity because of sex segregation.”²⁹⁴ The parents also complained of classroom and bus segregation by race, and of rules that prevented them from visiting the schools to investigate these abuses.²⁹⁵ Huffman declared, “The aforementioned acts and conditions are in direct violation of the constitutional rights of American citizens,” and requested that “immediate corrective actions be taken.”²⁹⁶ In addition to seeking legal assistance, Amite County’s African American community participated in a 1970 boycott of white businesses that gave financial support to segregationist private academies.²⁹⁷ Nevertheless, the district court continued annually to approve the school board’s sex-segregated school assignments.²⁹⁸

As Part III described, in 1974 Congress passed the Equal Educational Opportunity Act, which contained several provisions mentioning “sex” alongside race, color, and national origin as a prohibited basis for school

291. AFSC Report, *supra* note 206, at 109.

292. Attachment to Motion to Supplement the Record, *United States v. Hinds County Sch. Bd. and Amite County Sch. Dist.*, Nos. 28030 & 28042 (5th Cir. July 8, 1970) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4164, Apr.-Nov. 1970). Roosevelt Steptoe, who had since become vice-president of Southern University, put it more bluntly to AFSC monitors in 1977: “A fear of throwing those young ladies in with those black boys prompted the sex segregation system.” AFSC Report, *supra* note 206, at 109.

293. *Hinds County*, 560 F.2d 619, 621 n.4.

294. Letter from Rufus C. Huffman, Education Field Director, NAACP Special Contribution Fund, to Attorney Melvin Leventhal at 1-2 (Oct. 14, 1970) (Library of Congress, Records of the NAACP, V: 2823, Folder: Schools: Mississippi, 1963-1971, n.d.).

295. *Id.*

296. *Id.*

297. See Thomas A. Johnson, *Mississippi Faces Negroes’ Boycott: Their Leaders Act Against Merchants Who Support New All-White Schools*, N.Y. TIMES, Jan. 9, 1970, at 1.

298. *Hinds County*, 560 F.2d at 621.

assignment.²⁹⁹ In late December of that year, the federal government filed a supplemental brief with the Fifth Circuit, arguing that the EEOA proscribed Amite County's sex segregation policy.³⁰⁰ Six months later, the court required Amite County "to show cause why the EEOA did not mandate discontinuance of their sex-segregated assignment plan."³⁰¹ The school district argued that, for various reasons, the EEOA was inapplicable, and that racial motivation remained the appropriate standard for evaluating sex separation. Apparently under the impression that the federal government had entered into settlement negotiations with the school board, the court did not act on the supplemental briefs for over two years.³⁰²

In the meantime, African Americans in Amite County were losing patience. After seven years of sex segregation, white flight had left Amite County's schools with a student body that was more than eighty percent black, but the school board remained firmly under white control.³⁰³ In 1976, after the school board reiterated its unwillingness to act without a court order, local NAACP members went to their state branch director in Jackson to discuss the black parents' concerns. Again, the parents complained that their children were receiving an "inferior education" because "boys are not permitted to take certain courses, such as Home Economics, and girls are not able to take certain courses, such as shop and the vocational courses," and that the black students' frustration manifested itself in a "lack of interest" in their studies.³⁰⁴ Parents also worried that their children were being deprived of healthy heterosocial interaction, and they "sounded a special alarm about the tendency of boys to homosexuality in the system."³⁰⁵ After a series of mass meetings with African American parents in Amite County, the state NAACP chairman Emmett Burns wrote a letter to the Fifth Circuit panel responsible for overseeing school desegregation in Mississippi, emphasizing that pervasive dissatisfaction with sex segregation among African American

299. See *supra* note 10.

300. *Hinds County*, 560 F.2d at 621-22.

301. *Id.* at 622.

302. *Id.*

303. The schools in Amite County had been even more overwhelmingly black during the first couple of years of desegregation. See *supra* note 288; Report of School Organization as of April 15, 1970, *United States v. Amite County School District*, Nos. 28042 & 28030 (5th Cir. 1970) (NARA, S.W. Reg. Div., RG 276, Fifth Circuit, Case Files, Box 4163, Nov. 1969 (pt.)-March 1970) (reporting that less than 200 of the more than 2700 students in the county's public schools were white). By 1973, the number of white students had increased to almost 500. *Opposition of Amite County School District to Plaintiff's Motion for New Plan of Pupil Assignment, United States v. Hinds County School Board and Amite County School District*, Nos. 28030 & 28042 (5th Cir. Oct 31, 1973) (NARA, S.W. Reg. Div., RG 276, Box 4167, USCA 5th Cir. Case Files, 28030 & 28042, Box 4167, Sept. 1972-1973).

304. Letter from Emmett C. Burns to Judges Griffin Bell, Homer Thornberry, & Lewis Morgan, *United States Court of Appeals for the Fifth Circuit* (Aug. 4, 1976) (on file with the Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

305. *Id.*

students and parents should override the objections of a minority of whites to coeducation.³⁰⁶ After all, Burns reasoned, the public school population in Amite County was now over eighty percent black. Furthermore, Burns told the *Jackson Daily News*, the single-sex system “doesn’t properly prepare students to function in society because ‘we don’t live in a sexually segregated world.’”³⁰⁷

By 1977, the rhetoric and stakes of the controversy had escalated. In August, the Amite County and Mississippi state branches of the NAACP issued a joint press release in which they

again deplore[d] the South African, Rhodesian type apartheid system of strict school segregation by sex in the Amite County School System. The elements of apartheid are principally present: Minority rule (only twenty (20) percent of the school system’s children are white) yet the minority opinion absolutely determines policy; the races are segregated by sex in an attempt to keep Black males and white females separated, but in the process Black males are denied co-education with Black females; and, a total disregard for the feelings, wishes, and thoughts of the Black majority.³⁰⁸

If remedial action was not forthcoming, “the only alternative left” was for “the NAACP to pull the Black students out of school in an act of protest come fall.”³⁰⁹ The statement acknowledged that such an action “would seriously hamper the educational progress of Black students specifically, and the school system in Amite County generally, but the continued apartheid system is more serious. We cannot and will not participate in a system that works to our detriment,” the press release declared, for “a school system that contributes to zombi-ism and homosexuality is both pedagogically and racially unsound.”³¹⁰

The NAACP and the black community of Amite County followed through on their pledge, successfully launching a boycott that kept the vast majority of students in the district at home. As the school year began, only 391 white students and forty-four black students were in class, out of a projected enrollment of 2,400. Several hundred protesters gathered on the steps of the county courthouse to protest sex segregation, and black leaders vowed to continue the boycott for as long as was necessary to convince the school board to ask the Fifth Circuit for a coeducational

306. *Id.*

307. Jerry Oglethorpe, *Boycott in Amite Threatened*, JACKSON DAILY NEWS (JACKSON, MISS.), Aug. 4, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

308. Press Release, Amite County NAACP and Mississippi State Conference, NAACP (Aug. 3, 1977) (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

309. *Id.*

310. *Id.*

assignment plan.³¹¹ Robert Wilson, the only African American member of the school board—and the only elected black official in the county—made no secret of his disdain for sex segregation, but he initially stopped short of endorsing the boycott. Wilson urged parents to “put the concern of your children first—do not allow a few illiterate people to destroy your children's lives forever.”³¹² Boycott leaders were steadfast, however. “We know some will get hurt by this,” said Rosie Wilson, whose own children were missing school. “[B]ut . . . [w]e want the boys and girls in the same school this year. We’re going at this, step by step.”³¹³

At a contentious school board meeting held several days after the boycott commenced, a delegation of about seventy African Americans confronted the three white school board members in attendance. Dorothy Chesser read a letter asking for their resignation on the grounds that the members “steadfastly refuse to serve the needs of the majority of the people you represent.”³¹⁴ The white board members expressed satisfaction with the single-sex system, asserting that sex segregation was instituted at the suggestion of HEW, a recollection that black parents and their attorneys did not share. The proposed HEW plan of 1969 had not called for sex segregation, and there is no evidence that HEW officials affirmatively suggested such an arrangement at any time.³¹⁵ For his part, Maurice Foreman, the white superintendent of schools, insisted that he had no power to express an opinion on sex segregation, much less ask the courts to take legal action.³¹⁶ Board member Bernard Dunaway challenged African American parents to vote him and the other white members out of office if they were dissatisfied with their performance, and defended sex

311. Daniel Sheridan, *School Boycott Leader Vows to Continue*, NATCHEZ DEMOCRAT (NATCHEZ, MISS.), Aug. 31, 1977.

312. *Sex-Segregated Schools Boycotted*, N.Y. TIMES, Aug. 31, 1977.

313. *Id.* It is not clear whether Robert and Rosie Wilson were related; one newspaper report suggested that they may have been husband and wife. See *Boycott Continues at Amite School*, GLOSTER WEEKLY (GLOSTER, MISS.), Sept. 2, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81 (referring to “Rosa Wilson” as the wife of school board member Robert Wilson)).

314. Associated Press, *Black Parents in Amite County Vow to Continue Boycott of Schools*, HATTIESBURG AMERICAN, Sept. 2, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81); Associated Press, *School Boycott Vowed over Sexual Segregation*, L.A. TIMES, Sept. 4, 1977, at 28.

315. It is true that in some instances HEW declined to take a position on sex segregation in school district-drawn desegregation plans. In 1977, former Judge Griffin Bell recalled, in the words of an aide, that the “segregation-by-sex plan was drafted by the school board and was accepted by the court with the consent of black plaintiffs.” Helen Dewar, *Blacks Boycott Sex-Segregated Schools*, WASH. POST, Sept. 4, 1977, at 32; see also Emmett C. Burns, Director's Report, 1976, Mississippi State Conference, NAACP (Library of Congress, Records of the NAACP, Container 2570, Folder: Branches—States: Mississippi, Mississippi State Conference, 1964-76) (correcting misapprehension that sex segregation was part of HEW plan).

316. *Boycott Continues at Amite School*, GLOSTER WEEKLY (GLOSTER, MISS.), Sept. 2, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

segregation as legitimate.³¹⁷ “Are you insinuating there’s something wrong with black boys—that they shouldn’t go to school with white girls?” Chesser asked Dunaway at one point. “I didn’t say anything to insinuate that,” Dunaway answered. “I just said we had different schools for the whites and for the coloreds” before coeducation ended in 1969.³¹⁸

The school board meeting made clear that neither side was prepared to give an inch. Almost two weeks later, the boycott was still in full force, with picketers greeting the few students still attending each of the county’s four schools. Many wore signs reading, “End Sex Discrimination.” By this time, black board member Robert Wilson no longer expressed reluctance about the boycott, telling the *New York Times* that this was “only ‘a first step’ toward gaining equality for Amite blacks, who for the most part are poor and lack political organization.”³¹⁹ For some, these concerted actions marked a milestone in local African American mobilization. The eighty-seven-year-old aunt of picketer Mrs. A.M. Tobias attended a mass demonstration in her wheelchair; as this lifelong Amite County resident, Ms. Pinkie Griffin, told the *Jackson Clarion-Ledger*, she “never thought she would see this in Amite County. Yes,” she declared, “this is history being made.”³²⁰

As these protests suggest, neither the racial motivation standard nor the analogy-based sex discrimination argument was capacious enough to capture what was at stake for Amite County’s African American community in confronting Jane Crow. It was apparent to African American parents from the start that the white school board’s motives were suspect, but equally important to them was autonomy and control over their children’s education. Jane Crow had not worked: it had not kept white students or financial resources in the public schools. Nor had Amite County’s white leaders allowed African Americans to share equally in the administration of the school system. Those failures rendered the sex separation policy an apartheid-like regime imposed by a minority on the majority, in contrast to its function in Taylor County as a pragmatic, if offensive, solution for phasing out Jim Crow.

Further, although Amite County protesters held signs proclaiming “End Sex Discrimination,” they defined “sex discrimination” somewhat differently from those who advanced the legal theory that sex separation in school desegregation plans discriminated on the basis of sex. As Part III

317. Daniel Sheridan, *Amite Trustees Refuse to End Sex Segregation*, NATCHEZ DEMOCRAT (NATCHEZ, MISS.), Sept. 2, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

318. Mike Williamson, *Amite Board Endorses System*, ENTERPRISE-JOURNAL, Sept. 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

319. B. Drummond Ayres, Jr., *Blacks Boycott Schools Segregated By Sex*, N.Y. TIMES, Sept. 13, 1977, at 16.

320. Lonnie Wheeler, *Race Underlying Issue in Liberty*, JACKSON CLARION-LEDGER (JACKSON, MISS.), Sept. 3, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

described, Robert Barnett, the ACLU attorneys in *Helwig*, and the AFSC constructed an analogy-based sex discrimination argument that emphasized the psychological and material harm imposed upon girls by sex segregation. In this view, Jane Crow subordinated girls just as Jim Crow had subordinated African Americans, offering girls an inferior education and stigmatizing them as less academically able than boys. African Americans in Amite County articulated the harm of sex segregation as a restriction on the freedom of both boys and girls to make curricular choices—boys to choose home economics, girls to choose vocational training. This lack of choice meant, to them, that their children were receiving an “inferior education” as a result of sex segregation. African Americans complained that single-sex education did not adequately prepare their children for post-schooling life: “[W]e don’t live in a sex-segregated world,” they emphasized.³²¹ Finally, if Jane Crow imposed on one sex more than the other, it arguably was boys who suffered most. After all, no one doubted that a primary impetus behind sex segregation from whites’ perspective was the desire to keep black boys away from their white daughters. And this was not merely a stigmatic distinction, but a material one in many Jane Crow districts: both Amite and Taylor Counties adopted the common policy of converting the formerly black campuses into boys’ schools, and the formerly white campuses into girls’ schools. As Taylor County Girls School principal Jerry Partain put it, “In the South, we have always been very protective of our women.”³²²

African American families also worried that sex segregation deprived young people of the “normal,” heterosocial relationships fostered by a coeducational environment. Black parents and students apparently valued coeducational schools as an opportunity to cultivate heterosexual relationships among African Americans and saw single-sex schools as hindering healthy interactions between boys and girls. As sixteen-year-old Victor Powell, an African American junior at the Central Attendance Center for Boys, just outside the town of Liberty, Mississippi, told the *New York Times*: “It’s the worst kind of arrangement. You don’t have a normal relationship. You get to see girls only after school, or maybe not at all if you live way out on a farm.”³²³ And if many white parents feared that biracial coeducation was a slippery slope toward “amalgamation,” some black parents worried that single-sex education encouraged homosexuality.

Neither of the legal paradigms developed to address Jane Crow captured the stakes of sex segregation for the African American communities of

321. Jerry Oglethorpe, *Boycott in Amite Threatened*, JACKSON DAILY NEWS (JACKSON, MISS.), Aug. 4, 1977 (Library of Congress, Records of the NAACP, V: 2570, Folder: Branches—States—Mississippi: A-J Misc., 1956-81).

322. Quoted in Brown, *supra* note 90, at iii.

323. Ayres, *supra* note 319, at 16.

Taylor and Amite Counties. Notably, the legal discourse also obscured the assumptions about children's sociability and sexuality that were so central to arguments for and against sex segregation. Part VI will address this subject further, but first, Part V describes the legal fate of sex-segregated public schooling in the 1970s.

V. NOT "THE CASE THAT COULD HAVE BEEN": SEX SEGREGATION'S LEGAL RESOLUTION

The issue of sex-segregated public primary and secondary education moved through the courts along two separate tracks. The Jane Crow lawsuits, most of which originated in the Fifth Circuit, were filed between 1969 and 1974; some were resolved by district courts, others awaited resolution for anywhere from three to eight years. The sex segregation suit that reached the Supreme Court, *Vorchheimer v. School District of Philadelphia*, was not a Jane Crow case. That is, the sex segregation policy challenged in *Vorchheimer* had nothing to do with racial desegregation; rather, it was an artifact of elite public single-sex schooling that dated back to the nineteenth century. *Vorchheimer* was filed in 1974, significantly later than most of the Jane Crow cases,³²⁴ but moved much more expeditiously through the courts, reaching the Supreme Court for oral argument by early 1977. The Jane Crow cases never reached the high court. Instead, the Fifth Circuit sidestepped the thorny constitutional questions implicated in these suits and resolved them through a straightforward application of the Equal Educational Opportunities Act (EEOA), the anti-busing measure that incidentally prohibited school assignments on the basis of sex as well as race, color, and national origin.³²⁵

This Part addresses the legal fate of each strand of the 1970s sex segregation litigation. The first section describes the anti-climactic but unambiguous resolution of the Jane Crow cases, a resolution that not only killed Jane Crow but also contributed to its constitutional and historical obscurity. The second section analyzes the *Vorchheimer* litigation and reveals how the case highlighted the strategic shortcomings of a sex discrimination argument based on an analogy to racial segregation.

A. "To Comply with the Statutorily Mandated Scheme": Jane Crow's Legal Fate

As we saw in Part IV, African Americans' perspective on sex segregation revealed the limitations of both of the dominant legal paradigms—race discrimination and sex discrimination—used by advocates and judges to assess the constitutionality of sex segregation. In

324. Most of the legal challenges to Jane Crow arose in 1969-70; the *Helwig* case, also filed in 1974, is an exception.

325. See *supra* note 10.

the end, though, neither of these theories governed Jane Crow's legal fate. Instead, after years of silence, the Fifth Circuit avoided passing judgment on the constitutionality of sex segregation, deciding the Amite County case as a clear violation of the EEOA's statutory ban on school assignments based on race or sex. This statutory resolution in a lower court meant that the Jane Crow cases not only evaded the Supreme Court's notice, but also escaped constitutional review altogether.

The decision that killed Jane Crow came several weeks into the 1977 Amite County school boycott when the Fifth Circuit finally issued a ruling on the district's sex separation policy, seven years after African Americans first petitioned the district court for relief. The legal landscape had changed since the Circuit had last addressed a sex segregation scheme, in the 1972 case *United States v. Georgia*.³²⁶ Then, the court had affirmed earlier hints that the standard for evaluating such plans was whether they were motivated by racial discrimination or by valid educational purposes.³²⁷ Now, the racial motivation standard appeared especially congenial to the Amite County School Board, when compared with the EEOA, and they clung to it.³²⁸ The school district's lawyers apparently believed that they would have a better chance enumerating the educational purposes behind sex segregation than finessing the clear language of the EEOA. Lawyers for the school district also argued that the EEOA should be interpreted to allow sex segregation, as it was practiced in Amite County. Any other interpretation, they asserted, would rest on the erroneous assumption that Congress intended to safeguard rights beyond the scope of the Fourteenth Amendment's protections.³²⁹

By the fall of 1977, the Amite County appeal was before a reconfigured circuit court panel. Griffin Bell, who previously presided over the Mississippi desegregation cases, left the court in early 1976 and became President Jimmy Carter's attorney general in 1977. His replacement on the panel, Charles Clark, had been President Nixon's first nominee to the Fifth Circuit. Clark was no stranger to desegregation controversies, having represented the University of Mississippi Board of Trustees in the dispute over James Meredith's attempt to integrate Ole Miss in 1961-63.³³⁰ According to historians Frank Read and Lucy McGough, Clark had been "a vigorous defender of his client's policies of segregation," but had "earned the respect of the Court's membership in the forthright manner he disassociated his clients from the intransigent Governor Barnett."³³¹ By 1977, Clark had become "perhaps the most articulate and powerful spokesman" for judicial restraint on the court, and "as the only member

326. *United States v. Georgia*, 466 F.2d 197 (5th Cir. 1972).

327. *Id.* at 200.

328. *United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 623 (5th Cir. 1977).

329. *Id.* at 624.

330. READ & MCGOUGH, *supra* note 87, at 454.

331. *Id.*

... with school-age children," he was "acutely aware of some of the troubling academic and disciplinary problems that can follow forced integration."³³²

In keeping with this philosophy of restraint, Clark avoided the constitutional question of whether sex segregation violated the Fourteenth Amendment. Writing for himself and his colleagues Lewis Morgan and Homer Thornberry, Clark sidestepped questions of Jane Crow's intent and effect, ruling that the plain language of the EEOA prohibited pupil assignments based on sex.³³³ The panel concluded that the EEOA superseded previous Fifth Circuit doctrine on sex segregation, rendering the racial motivation standard obsolete. Whether or not the school board could manufacture "educational purposes" was irrelevant: the language of the Act, on its face, prohibited pupil assignments based on sex. Further, Clark argued that Congress had indeed intended the EEOA to supplement constitutional protections, not merely to vindicate existing rights.³³⁴ Though no legislative history concerning the "sex" provisions of the EEOA existed, the court believed that the act "incorporate[d] a judgment that a sex-segregated school district is a dual rather than a unitary school system and results in a similar if not equivalent injury to school children as would occur if a racially segregated school system were imposed."³³⁵ This was as close as the panel came to addressing the relationship between race and sex segregation, and it did so not as a constitutional matter, but as a problem of statutory interpretation.

One week later, Louisiana federal district judge Jack M. Gordon ordered Jefferson Parish schools to end sex segregation and to develop a desegregation plan in compliance with federal law.³³⁶ In the months to

332. *Id.* Clark's children were attending the public schools of Jackson, Mississippi, when court-ordered desegregation commenced. *Id.*

333. *Hinds County*, 560 F.2d 619. Clark began by reviewing the procedural history of the case, describing without comment the factual findings made by district court judge Dan M. Russell back in 1970. *Id.* at 621 & n.3 ("[C]oncluding that 'the separation by sex plan stems from sound educational purposes as distinguished from racially discriminatory purposes' . . . [t]he district court entered specific findings that: (1) the separation of the students by sex has produced a unitary school system; (2) the achievement level of the male students had shown substantial improvement with no lessening in the level of the female students' improvement; (3) attendance levels of all students had improved; (4) normal disciplinary problems in school buildings and on busses and playgrounds had declined; (5) motivation of students and teachers had improved, with measurably improved leadership qualities on the part of the male students; and (6) the stability of the entire school operation . . . resulted in increased attendance by white students and in better cooperation of the community as a whole."). Clark then noted that when the court "permitted the temporary use of [this] modified plan, we expressly noted that our order was 'an interim emergency measure to stabilize the education process in this school district . . . and is not to be construed as a precedent.'" *Id.* at 622. He continued, "Nothing this court has done before or since may be construed as permanently approving this type of student assignment." *Id.*

334. Two decades later, the Supreme Court would more narrowly define Congress's enforcement power under Section 5 of the Fourteenth Amendment in a series of cases beginning with *City of Boerne v. Flores*, 521 U.S. 507 (1997).

335. *Hinds County*, 560 F.2d at 623.

336. *Sex Segregation Banned in 2d Case*, N.Y. TIMES, Sept. 29, 1977, at 18; Gordon Gsell, *Sex Segregation Illegal?* NEW ORLEANS TIMES-PICAYUNE, Sept. 29, 1977, § 1, at 1. The Jefferson Parish

follow, the remaining Jane Crow districts began the process of reinstating coeducation. But although the Fifth Circuit had finally put an end to Jane Crow, the court declined to mediate the heated disputes over the intent and effects of sex segregation that the parties and their lawyers had waged for the better part of a decade. The court did not explore why Congress might have concluded that sex segregation “results in a similar if not equivalent injury” to racial segregation, nor did it address the constitutionality of sex segregation as a tool of racial desegregation. As the next section shows, the sex segregation case that did reach the Supreme Court produced a result even less satisfying to opponents of segregation; moreover, it demonstrated the strategic shortcomings of a sex discrimination argument based upon an analogy to Jim Crow.

B. “As Orderly a Retreat as Possible”: Sex Segregation in the Supreme Court

In conventional legal narratives of sex separation in public elementary and secondary schools, the leading case of the 1970s is *Vorchheimer v. School District*, which the Supreme Court considered several months before protests erupted in Amite County, Mississippi.³³⁷ In *Vorchheimer*, a white female student challenged her exclusion from Central High School, a venerable all-male Philadelphia institution, arguing that Girls’ High, Central’s female counterpart, offered a materially inferior and less prestigious academic experience. A federal district court judge ordered Susan Vorchheimer’s admission to Central, but the Third Circuit reversed, and the Supreme Court split 4-4, letting the lower court’s ruling stand without passing judgment on the constitutionality of public single-sex education.

We saw earlier that despite its understandable appeal to feminists, the sex discrimination argument failed to capture fully the substance of African Americans’ objections to Jane Crow. This section examines the sex segregation case that did reach the Supreme Court, which as we can now see, was not representative of much of the sex segregation litigation of the late 1960s and 1970s. Philadelphia’s sex segregation policy was long-standing, confined to the district’s most prestigious high schools, and unrelated to racial desegregation. In other words, the relationship of sex segregation to racial segregation in *Vorchheimer* was more purely

School Board set out a five-year plan for compliance with the court’s decision. The plan called for coeducation in two of the parish’s schools in 1978-79, two more in 1979-80, and the final two by the fall of 1981. Plaintiff Laura Tracy expressed displeasure with the plan’s length, noting that she herself would graduate in 1981. But her mother, Dr. Else Tracy, and their attorney, Jack Peebles, agreed that more litigation would only prolong the process further. See AFSC Southeastern Public Education Program, *School Board Plan Stands*, CREATED EQUAL, Jan. 1978, at 2.

337. *Vorchheimer v. Sch. Dist.*, 532 F.2d 880 (3rd Cir. 1976), *aff’d by an equally divided court*, 430 U.S. 703 (1977) (per curiam).

analogical, rather than intersectional.³³⁸ *Vorchheimer* illustrates how even—or perhaps especially—in such a case, a sex discrimination argument based on an analogy to Jim Crow had its pitfalls as a legal strategy. As Susan Vorchheimer and her lawyers discovered, positing that sex segregation was like racial segregation set the constitutional bar unreachably high for plaintiffs.

In its language and substance, Susan Vorchheimer's class action lawsuit against the Philadelphia school district echoed the concerns animating *Brown*. Filed in the spring of 1974 by local attorney and Girls' High alumna Sharon Wallis, the complaint asserted that the "sexual segregation of Philadelphia's academic high schools imposes upon female students a badge of inferiority, teaching them expressly and by example that they are not qualified to compete with male students in academic pursuits."³³⁹ Susan's testimony before federal district court Judge Clarence C. Newcomer similarly indicated that she feared psychological damage and material harm if she attended Girls' rather than Central.³⁴⁰ Wallis also cited Central High's long and distinguished history, its large private endowment, and its record of producing alumni who assumed local and national leadership positions.³⁴¹ Girls' High, on the other hand, was "less prestigious," its alumni were "less influential," and its educational program "traditionally suffered from sexual stereotyping attributing lower career aspirations to women."³⁴² In contrast to the meticulously assembled social science evidence in *Brown*, though, Wallis presented no psychological or sociological data on the effects of sex segregation on girls. For its part, the school district called two experts to testify about the purported educational benefits of single-sex education.

District Judge Newcomer was persuaded neither by Wallis's analogy to *Brown* nor by the school district's assertion of single-sex education's pedagogical rewards. Oddly, the judge opined that the substantially equal education offered by Central and Girls' High Schools took the case "out of the realm of *Brown v. Board of Education*."³⁴³ Moreover, he explicitly rejected Wallis's argument that the exclusion of girls from Central High created a feeling of inferiority in female students, noting that even if the

338. The origins of sex-segregated education in the North were hardly free of racial, ethnic, and class undertones; in the nineteenth and early twentieth centuries, single-sex schools assuaged nativist fears about mixing with immigrants and middle-class aversion to the "rough" ways of poor boys and girls. See DAVID TYACK & ELIZABETH HANSOT, *LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS* 95 (1992).

339. Appendix at 9a, *Vorchheimer v. Sch. Dist.*, 430 U.S. 703 (1977) (No. 76-37) [hereinafter "*Vorchheimer Appendix*"].

340. *Id.* at 9a-10a; *Vorchheimer v. Sch. Dist.*, 400 F. Supp. 326, 328 (E.D. Pa. 1975) ("I didn't think I would be able to go there for three years and not be harmed in any way by it.").

341. *Vorchheimer Appendix*, *supra* note 339, at 9a.

342. *Id.*

343. This statement is odd because the import of *Brown* rested on the very fact that the decision did not depend upon a showing that school facilities provided to black and white children were materially unequal. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("Separate but equal educational facilities are *inherently* unequal.") (emphasis added).

much-criticized sociological evidence cited in *Brown* was legitimate, the plaintiff had not presented any evidence of psychological detriment here. Instead, Newcomer staked the outcome of the case on the appropriate equal protection standard of review, and after concluding that heightened scrutiny applied, he found that no legitimate educational objectives justified Central's refusal to admit girls. If the district's true purpose was to protect girls from the disadvantages of coeducation, then all of Philadelphia's schools should be sex-segregated, he argued. "[M]ales, and not females, are the intended beneficiaries of defendants' exclusionary policy," he concluded.³⁴⁴ When the court ordered Central High to admit female students, the district initially moved to comply with the ruling, but irate alumni convinced the school board to appeal.³⁴⁵

The Third Circuit, like the lower court, rejected the plaintiff's analogy to racial segregation. But unlike Judge Newcomer, the panel's majority concluded that not even the Supreme Court's new sex discrimination jurisprudence could redeem Susan Vorchheimer's claim. Judge Joseph Francis Weis, Jr. wrote for the court that the "substantial equality" of Central and Girls' High Schools took the case not only out of realm of *Brown*, but also out of the realm of heightened scrutiny. Even if heightened scrutiny were applicable, Weis contended, the school district had presented "sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools."³⁴⁶ Significantly, Weis suggested that the intent underlying the maintenance of single-sex schools was of primary importance. Although sex separation "has limited acceptance on its merit," the judge wrote, "it does have its basis in a theory of equal benefit and not discriminatory denial."³⁴⁷ Unlike racial segregation, the majority asserted, sex separation was born of benign intentions.

344. *Vorchheimer*, 400 F. Supp. at 342.

345. Superintendent Michael Marcuse declared himself a "proponent of coeducational schools," stating that he was "more concerned about maintaining the academic standards than the composition of the school." Ewart Rouse and Steve Twomey, *Judge Tells Central High to Go Co-ed*, PHILADELPHIA INQUIRER, Aug. 8, 1975, at 1-A. Board of Education President Arthur Thomas opined that appealing to a higher court "would be an exercise in futility." *Id.* The editorial board of the *Philadelphia Inquirer* heartily approved Judge Newcomer's ruling, declaring that "[t]o require separation of students by sex, as a matter of public school policy, may have seemed normal in the 19th century but is an anachronism in this day and age." Editorial, *Central High Will Survive*, PHILADELPHIA INQUIRER, Aug. 15, 1975. Some alumni also were resigned to the admission of girls to Central. Philadelphia's African American mayoral candidate, Charles Bowser, himself a Central alumnus, acknowledged that though he found the change "uncomfortable," he was "sure there are talented young women that will benefit from [Central] as much as I did." Robert Fowler, *Central Alumni Taken By Surprise*, PHILADELPHIA INQUIRER, Aug. 8, 1975, at 2-C. However, many Central alumni, and some school board members, expressed their displeasure. Tobyann Boonin, a Girls' High graduate whose husband and three sons were Central alumni, urged her fellow board members to appeal Judge Newcomer's decision, while 1959 Central graduate Barry Bannett lamented that the admission of girls would "destroy[] the integrity of the school." By the end of August, opponents of coeducation in Philadelphia's elite public high schools had convinced the school board to appeal the judge's ruling. Rouse and Twomey, *supra* at 2-A; Fowler, *supra* at 2-C.

346. *Vorchheimer v. Sch. Dist.*, 532 F.2d 880, 887-88 (3d Cir. 1976).

347. *Id.* at 887.

Dissenting Judge John J. Gibbons strongly disagreed, opening his opinion with an extended comparison of Weis's reasoning to *Plessy v. Ferguson*.³⁴⁸ Noting the majority's emphasis on the voluntary nature of Susan Vorchheimer's choice of an "academic" high school over other educational alternatives, Gibbons retorted:

It was "voluntary," but only in the same sense that Mr. Plessy voluntarily chose to ride the train in Louisiana. The train Vorchheimer wants to ride is that of a rigorous academic program among her intellectual peers. Philadelphia, like the state of Louisiana in 1896, offers the service but only if Vorchheimer is willing to submit to segregation. Her choice, like Plessy's, is to submit to that segregation or refrain from availing herself of the service.³⁴⁹

For the first and only time in the *Vorchheimer* litigation, the analogy between sex separation and racial segregation gained a judicial adherent.

The content of the certiorari petition and briefs filed in *Vorchheimer* have led some scholars to surmise that Ruth Bader Ginsburg, then head of the ACLU Women's Rights Project (WRP), pursued a strategy based on a full-blown parallel between race and sex segregation, using *Brown* as a model for arguing the Philadelphia case.³⁵⁰ In fact, Ginsburg's papers reveal that she recognized the strategic pitfalls of such an approach, and worked actively to downplay the analogy that Susan Vorchheimer's original attorney had promoted in the lower courts and in her draft certiorari petition. Many judges, Ginsburg realized, saw sex separation as benignly intended, devoid of the invidious purposes and hostile motivations of racial segregation. Framing the *Vorchheimer* case as analogous to *Brown*, she anticipated, could be interpreted as a broad-based attack on single-sex education as inherently unequal in all circumstances—a position the Supreme Court was unlikely to embrace. As we shall see, records of the Court's internal deliberations vindicate Ginsburg's concern.

Ginsburg's Women's Rights Project, enlisted to help Wallis with Vorchheimer's Supreme Court appeal, was anxious to avoid the bold parallel embraced by Judge Gibbons's dissent. WRP attorneys initially

348. Gibbons wrote:

I was under the distinct impression . . . that "separate but equal" analysis, especially in the field of public education, passed from the fourteenth amendment jurisprudential scene over twenty years ago. The majority opinion in establishing a twentieth-century sexual equivalent to the *Plessy* decision, reminds us that the doctrine can and will be invoked to support sexual discrimination in the same manner that it supported discrimination prior to *Brown*.

Id. at 888-89 (Gibbons, J., dissenting). Gibbons, like Newcomer and Weis, was a Nixon appointee.

349. *Id.* at 889.

350. See, e.g., Michael Heise, *Are Single-Sex Schools Inherently Unequal?*, 102 MICH. L. REV. 1219, 1228-29 (2004) (reviewing ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* (2004)). Before examining archival sources, I too assumed that the WRP was in control of the *Vorchheimer* litigation. See Mayeri, *supra* note 189, at 1078 n.162 ("Unlike most post-*Frontiero* cases, the WRP utilized race-sex analogies in *Vorchheimer*.").

expressed optimism that they could forge a cooperative relationship with Wallis, and Ginsburg declared herself “[g]lad all of us agree that separate and unequal is the position we should push.”³⁵¹ But their collaboration eventually deteriorated. The problems began with Wallis’s draft petition for certiorari, which Ginsburg thought, among other problems, “overplay[ed] the sex/race analogy” and got “into hot water” on the issue of whether schools that excluded whites or males were constitutionally problematic.³⁵² Deficiencies in the factual record also dismayed WRP lawyers as they attempted to help Wallis with her submissions to the Court.³⁵³ The high quality of the Philadelphia school district’s brief “convince[d]” Ginsburg that the WRP was “on the right track” in proceeding cautiously.³⁵⁴ The school district refuted the race parallel and emphasized the possibly fatal consequences for single-sex education if the plaintiffs prevailed. “Now,” Ginsburg wrote to her colleagues, “we must go even further to make it plain that our class seeks no ‘sweeping’ change, leaves ‘the system’ intact, and ‘freedom of choice’ an open question.”³⁵⁵ But the WRP lost control over Vorchheimer’s reply brief after a dispute with Wallis over its content.³⁵⁶

Before the WRP and Wallis parted ways, Ginsburg drafted her own reply brief, which contrasted with Wallis’s eventual submission to the Court in its treatment of the race analogy, among other issues of form and substance. Though Wallis’s brief disclaimed any contention “that gender based classifications in education are totally analogous to those based on race,” she quoted extensively from *Brown*, including the decision’s “inherently unequal” language. Ginsburg’s draft, instead, invited the Court to consider sex segregation on its own terms, and in a particular historical context. She wanted to assure the Justices that petitioners were not

351. Memorandum from Ruth Bader Ginsburg to Jill Goodman (May 11, 1976) (on file with the Library of Congress, Ruth Bader Ginsburg Papers, Container 9, Folder: Vorchheimer v. School Dist., Correspondence, 1976).

352. Letter from Ruth Bader Ginsburg to Jill Goodman 1-2 (June 11, 1976) (Library of Congress, Ruth Bader Ginsburg Papers, Container 9, Folder: Vorchheimer v. School Dist., Correspondence, 1976).

353. *Id.*

354. Memorandum from Ruth Bader Ginsburg to Sharon K. Wallis, Jill Laurie Goodman, & Lynn Hecht Schafran 1 (Jan. 11, 1977) (Library of Congress, Ruth Bader Ginsburg Papers, Container 9, Folder: Vorchheimer v. School Dist., Correspondence, 1977).

355. *Id.*

356. Chagrined by what its attorneys viewed as the low quality of Wallis’s draft, the ACLU conditioned its assumption of printing costs upon her acceptance of their suggested changes. According to ACLU lawyer Spencer Coxe, Wallis told him “it was better to agree to disagree,” and that “she would go her own way.” Letter from Spencer Coxe to Kathleen Peratis, Ruth Bader Ginsburg, & Lou Pollak (Feb. 23, 1977) (Library of Congress, Ruth Bader Ginsburg Papers, Container 9, Folder: Vorchheimer v. School Dist., Correspondence, 1977). The WRP offered to assist her in the oral argument, but Wallis “made it clear that she wanted to proceed on her own. And so,” concluded Coxe, “the sorry tale ends.” *Id.* Justice Lewis Powell, for one, found Wallis’s oral argument “entirely confusing . . . no help.” Lewis F. Powell, Jr., Oral Argument Notes, 76-37 Vorchheimer v. Sch. Dist. (Feb. 22, 1977) (on file with Powell Archives, Washington and Lee University School of Law, Lewis F. Powell, Jr. Papers, Supreme Court Case Files).

“request[ing] an order abolishing single-sex schools as an educational alternative,” nor were they “assert[ing] that single-sex schools are per se impermissible.” Rather, the WRP’s tightly written missive focused on the history of single-sex elite education in Philadelphia, arguing that “reservation of Central to young men has deep roots in ‘sexist concepts once and still prevalent about women.’” The policy “simply perpetuat[ed] the gender line drawn in 1836,” and reinscribed in the 1890s when feminists failed in their effort to move women into “intransigent” “male bastions” and instead were forced to settle for separate and inferior schools.³⁵⁷ Ginsburg’s reply brief never reached the Court in an official capacity, but she did distribute the document to a number of interested parties, including *New York Times* reporter Lesley Oelsner, Assistant Attorney General Drew Days, and Jerry Lynch, Ginsburg’s former student and a law clerk to Justice William Brennan.³⁵⁸

Records of the Court’s deliberations suggest that Ginsburg’s concerns about over-zealously promoting a race analogy were well-founded. With Justice William Rehnquist sidelined by chronic back pain, Sharon Wallis made her argument to only eight of the nine Justices. After the Justices’ first conference, Lynch was optimistic about the plaintiff’s prospects: four members of the Court—Brennan, Potter Stewart, Thurgood Marshall, and Lewis Powell—“agreed that while the findings of the district court regarding the equality of the boys’ and girls’ schools were somewhat ambiguous, they could and should be read to mean that the schools were not in fact of equal prestige and quality.” Consequently, they agreed that “the court of appeals’ judgment upholding the sex segregation should be reversed.”³⁵⁹ Three Justices—Harry Blackmun, John Paul Stevens, and Chief Justice Warren Burger—“found that the two schools were substantially equivalent, that complete equality was unnecessary, and that the state should have freedom to experiment.” These three would therefore affirm the Third Circuit’s judgment.³⁶⁰ Justice Byron White felt the factual record on inequalities between the boys’ and girls’ schools was insufficiently developed, and thus tentatively voted to remand the case for further fact-finding.³⁶¹

By the Justices’ second conference vote, however, Chief Justice Burger was concerned that the Court would find itself equally divided on

357. Ruth Bader Ginsburg, Reply Brief for the Petitioners at 7-11, *Vorchheimer v. Sch. Dist.*, No. 76-37 (Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 10, Folder: *Vorchheimer v. School Dist. Pleadings, 1976-1977*) (draft: never filed).

358. See letters contained in Library of Congress, Manuscript Division Ruth Bader Ginsburg Papers, Container 9, Folder: *Vorchheimer v. School Dist., Correspondence, 1977*.

359. Memorandum from J.L. [Jerry Lynch] to Justice William J. Brennan, Jr. 1, Re: The Line-up in *Vorchheimer*, 76-37 (on file with the Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*).

360. *Id.*

361. *Id.* This was also the position of the United States. See Memorandum for the United States as Amicus Curiae, *Vorchheimer v. Sch. Dist.*, 430 U.S. 703 (1977) (No. 76-37).

Vorchheimer.³⁶² “In my view,” he wrote, “action by an equally divided Court would be open to valid criticism as an institutional failure to meet our obligations.”³⁶³ Therefore, Burger told his colleagues, his preference would be to canvass Justice Rehnquist’s view, or, alternatively, to have the case reargued in the presence of all nine Justices.³⁶⁴ “Obviously,” Burger declared, “we did not take this case to evaluate findings against the record but only to decide whether gender separated equal schools are ‘inherently unequal,’ and that issue should neither be evaded nor delayed.”³⁶⁵

Defining the issue presented by *Vorchheimer* this broadly was exactly the pitfall Ginsburg and her WRP colleagues had sought to avoid.³⁶⁶ If Burger could frame *Vorchheimer* as a question of whether separate but equal was “inherently unequal” in the context of single-sex education, he was assured victory. And Burger could safely call for reargument without jeopardizing his position, knowing that it was highly unlikely that Rehnquist would vote to reverse. Burger did not succeed, however, in convincing five of his colleagues to vote for reargument, so the 4-4 split meant that the Third Circuit’s ruling against *Vorchheimer* would stand.³⁶⁷

362. When neither remand nor reargument commanded a majority of Justices, White voted to affirm. See Lewis F. Powell, Jr., Conference Notes, 76-37 *Vorchheimer v. Sch. Dist.* (Mar. 25, 1977) (Powell Archives, Washington and Lee University School of Law, Lewis F. Powell, Jr. Papers, Supreme Court Case Files).

363. Memorandum from Chief Justice Warren E. Burger to the Conference (Apr. 11, 1977) (Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*). The Chief Justice was still smarting from criticism the Court suffered three years earlier for failing to resolve the questions raised by the University of Washington Law School affirmative action case *DeFunis v. Odegaard*. *Id.* (“I have an uneasy feeling that the *DeFunis* case will be linked with this—erroneously, of course; but it may appear even to some thoughtful people that the Court had evaded the issue at a time when the addition of one hour to the argument session would produce a definitive result.”).

364. Memorandum from Chief Justice Warren E. Burger to the Conference, Re: *Vorchheimer v. Sch. Dist. of Philadelphia* (Mar. 9, 1977) (Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*).

365. *Id.*

366. Justice Powell noted that four Justices disagreed with Chief Justice Burger’s judgment that the “separate is inherently unequal” question was properly presented. See Memorandum from Warren E. Burger to the Conference, Re: 76-37 *Vorchheimer v. Sch. Dist. of Philadelphia* (Mar. 9, 1977) (Powell Archives, Washington and Lee University School of Law, Lewis F. Powell, Jr. Papers, Supreme Court Case Files) (Powell wrote in the margin: “But 4 Justices are convinced this question is not fairly presented by this case”). The Justices who might vote to reverse the Third Circuit’s decision were not doing so on the grounds that all sex separation was unconstitutional *per se*. Rather, they were confining themselves to the specific facts of the Philadelphia case, where girls were excluded from a school with superior tangible and intangible qualities.

367. Blackmun, also on the side of the school district, agreed that “the Court will look bad, or at least awkward” if an equally divided vote were the result, and thus voted to reargue. Memorandum from Justice Harry A. Blackmun to Chief Justice Warren E. Burger, Re: *Vorchheimer v. Sch. Dist. of Philadelphia* (Apr. 18, 1977) (Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*). White, too, favored reargument. Memorandum from Justice Byron R. White to Chief Justice Warren E. Burger (Apr. 18, 1977) (Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*). Stevens did not, however, and apparently only one other Justice did. Memorandum from Justice John Paul Stevens to Chief Justice Warren E. Burger (Apr. 18, 1977) (Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*); Memorandum from Chief Justice Warren E. Burger to Justice Harry A.

The Chief Justice wrote to Blackmun that he was resigned to the inconclusive result. “[U]ntil the Court gives me two votes as in ancient English law when a court is equally divided, I find it difficult to cope with four unregenerate, unreconstructed ‘rebels’! In which case I conduct as orderly a retreat as possible.”³⁶⁸

To the Court’s critics, it was jurisprudential coherence that appeared to be in retreat. WRP director Kathleen Willert Peratis expressed her frustration with the Court’s capriciousness, complaining that “[e]very case seems to be decided on its own facts, depending on how the Court felt that day,” and Ginsburg agreed that “the Court is not giving courts and lawyers the guidance” they needed.³⁶⁹ The following year, Ginsburg reflected that perhaps the sex segregation issue had reached the Court too soon, without the “generation of litigation” that had laid the legal and sociological groundwork for *Brown*.³⁷⁰ In a speech several months later, she noted wistfully “the case that could have been”—*Helwig v. Jefferson Parish School Board*.³⁷¹

Though Ginsburg did not elaborate on her reference to “the case that could have been,” it is not difficult to imagine why *Helwig* seemed a better sex segregation test case than *Vorchheimer*. First and foremost, *Helwig* supplied the invidious intent missing from *Vorchheimer*. While the Third Circuit had found Philadelphia’s policy to be based in a “theory of equal benefit” rather than “discriminatory denial,” there was little question that racial motivations tainted the origins of sex segregation in Louisiana. As Tulane Law Professor and *Helwig*’s expert witness Melvin Gruwell put it, “there was a very, very definite tie between the policy of segregation by sex and the problems of racial desegregation.”³⁷² Further,

Blackmun, Re: *Vorchheimer v. Sch. Dist. of Philadelphia* (Apr. 18, 1977) (Library of Congress, William J. Brennan, Jr. Papers, Part I:421, Folder: *Vorchheimer v. School Dist.*) (“We will look ‘bad’ and the four who voted to reargue need not waive the ancient right to say ‘What did we tell you!’”). See also Letter from Lewis F. Powell, Jr. to Warren E. Burger, Re: No. 76-37 *Vorchheimer v. Sch. Dist.* (Apr. 18, 1977) (Powell Archives, Washington and Lee University School of Law, Lewis F. Powell, Jr. Papers, Supreme Court Case Files) (“As I view the case as involving unique facts, I am content to ‘let the chips lie where they fell.’”).

368. *Id.*

369. Lesley Oelsner, *Recent Supreme Court Rulings Have Set Back Women’s Rights*, N.Y. TIMES, Jul. 7, 1977. Reflecting on the 1976-77 Term as a whole, *Times* reporter Lesley Oelsner declared that the Supreme Court’s year “went against women—heavily,” quoting an anonymous law clerk who summarized the Term similarly: “This was the year the women lost.” *Quoted in id.*

370. Ruth Bader Ginsburg, George Abel Dreyfus Lecture on Civil Liberties, Tulane University School of Law, at 39 (Feb. 13, 1978) (Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 13, Folder: Speech File, Feb. 13, 1978).

371. Ruth Bader Ginsburg, Chapel Hill Address, at 22-23 (Sept. 22, 1978) (Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 14, Folder: Speech File, Sept. 22, 1978) (“Briefly, before turning to *Vorchheimer*, I should note the case that could have been. The Louisiana ACLU filed it in 197[4]. Jefferson Parish, Louisiana, segregated its high schools by sex the very day the schools were integrated by race. Separate and unequal opportunities were shown, and race discrimination in the background was apparent. But the trial court sat on the case for years, and refused to decide it.”).

372. AFSC Report, *supra* note 206, at 101. The editorial board of the *New Orleans Times-Picayune* expressed the same view of sex segregation’s origins in a pair of 1977 editorials praising the

in contrast to the sparse *Vorchheimer* record, the plaintiffs' attorney had compiled more compelling evidence in the *Helwig* case, replete with psychological and sociological assessments of sex segregation's harmful effects on girls and assertions of material disparities between the boys' and girls' schools. As Ginsburg reflected in 1978, "*Brown v. Board of Education* had been preceded by a generation of litigation in which decisions turned on the markedly inferior opportunities afforded blacks, on inequalities solidly demonstrated at trial . . . *Vorchheimer* may have been a case brought to the Court too soon, and with too spare a record."³⁷³

Vorchheimer thus failed to live up to the demands of a race analogy on multiple levels. The case had not showcased a well-developed factual and social science record comparable to that presented in *Brown*. That deficiency, as Ginsburg's comments suggest, might have been preventable. The strategic shortcomings of an analogy to racial segregation were more difficult to overcome. If sex segregation had to look just like racial segregation to be recognized as a constitutional harm, the battle was over before it began. If, as Ginsburg believed, the courts had trouble seeing the resemblance between sex separation and racial segregation when feminists framed their relationship as abstractly analogous, perhaps they would have been more willing to find constitutional harm when, as in the Jane Crow cases, the two phenomena were concretely interrelated. Instead, the Jane Crow cases remained doomed to constitutional obscurity.

VI. CONCLUSION: THE TRANSFORMATION OF ANTI-DISCRIMINATION DISCOURSE

The post-*Brown* debate over sex-segregated education provides an example of an evolving legal discourse, in which historical actors repeatedly redefined the social benefits of, and the legal and constitutional harms perpetuated by, a single social practice. The transformation of anti-discrimination discourse proceeded in overlapping stages. In the first phase, sex segregation remained relatively immune from legal challenge. In the second, disputants evaluated Jane Crow as a question of race discrimination. In the third stage, while race discrimination did not disappear from sight, sex discrimination became the primary lens through which participants in the debate viewed sex segregation. Each of these legal paradigms—non-discrimination, race discrimination, and sex discrimination—offered certain substantive and strategic advantages to those seeking to define the harm of segregation and fashion a remedy to

imminent return of coeducation. See Editorial, *Boys and Girls Together*, NEW ORLEANS TIMES-PICAYUNE, Oct. 1, 1977, § 1, at 22 ("[Sex segregation] was begun 15 years ago in response to a court order to end racial segregation."); Editorial, *Kudos for Jeff School Board*, NEW ORLEANS TIMES-PICAYUNE, Oct. 10, 1977, § 1, at 18 (praising the school board for "start[ing] to erase a mistake made during emotional and difficult times," and for "refusing to give in to the prejudices of the past").

373. Ginsburg, Dreyfus Lecture, *supra* note 370, at 39.

the injustice visited upon children, especially African American children, subjected to educational apartheid. Each, however, also contained significant flaws: each, in different ways, obscured what was at stake for the communities affected by Jane Crow; each provided only a partial characterization of sex segregation's harm; and each entailed strategic dilemmas for advocates seeking legal and constitutional change.

As we saw in Part I, sex separation proposals in the period from 1954 to the mid-1960s reflected a complicated mixture of political posturing and pragmatism, revealing how blurry were the lines between extremism and moderation in Southern segregation politics. The ambiguity and instability of Jane Crow's meaning, for better or worse, were on full display during this period. For some Southern lawmakers, calling for segregation by sex was nothing more than an attempt to bolster one's credentials as an ardent segregationist and opponent of "race-mixing," to endorse the hysteria animating the angry mobs of white parents who shouted obscenities at black children and the politicians who built careers inciting them. For many proponents of sex segregation, though, Jane Crow was a well-intentioned, realistic response to white Southerners' most visceral and intractable objections to racial integration. For moderates, sex segregation provided the elusive middle ground between steadfast resistance to and wholehearted acceptance of an educational environment that augured the possibility of interracial intimacy.

In the volatile climate of Southern segregation politics, the virtually unchallenged constitutional and legal legitimacy of sex segregation was double-edged. On the one hand, that legitimacy enabled pragmatists to suggest a solution that they believed might save Southern public schools from violent upheaval and ultimate destruction. Limited evidence suggests that many African Americans were willing to overlook the racial insult implicit in Jane Crow in order to vanquish Jim Crow: after all, it was educational quality, not what some euphemistically called "social equality," that they most fervently hoped integration would bring. On the other hand, the principal obstacle to recognizing sex segregation as racially discriminatory was not substantive but strategic. At a time when the Supreme Court assiduously avoided linking desegregation of public facilities to interracial marriage, proponents of school desegregation likely were loath to imply that coeducation was a necessary ingredient of racial equity. To do so was to lend credence to segregationists' apocalyptic claims that racial integration paved an inexorable path to "amalgamation." The constitutional legitimacy of sex segregation as an antidote to racial desegregation conveyed an unspoken understanding that if the states could ban interracial cohabitation and "miscegenation" outright, then surely they could take steps to curb the social precursors to interracial intimacy. To protest sex segregation as racially discriminatory would have disturbed the tacit bargain underlying *Brown* itself. Jane Crow's constitutional legitimacy thus reflected the precarious politics of education and

interracial intimacy more than the unconstrained preferences of communities attempting to dismantle Jim Crow.

While the motivations underlying sex segregation as a feature of racial desegregation plans changed little between 1954 and 1968, by the time the second phase of the Jane Crow debate began, the legal, political, and cultural context had undergone significant transformations.³⁷⁴ As Part II related, after *McLaughlin* and *Loving*, anti-miscegenation policies no longer enjoyed constitutional legitimacy, and civil rights advocates could more comfortably frame prophylactics against interracial intimacy as racial discrimination designed to maintain white supremacy.³⁷⁵ African American activism was enabled by and helped to shape a race discrimination paradigm for evaluating Jane Crow. A new legal standard quickly emerged in the Fifth Circuit: courts launched inquiries into whether sex segregation was motivated by “racial discrimination” or by legitimate “educational purposes.” African Americans in many school districts, sometimes with the support of the federal government, argued that sex segregation “perpetuate[d] racial segregation by subterfuge” and should be disallowed. The in-court testimony and out-of-court protests of African Americans persuaded a significant number of judges to reject Jane Crow, including some who initially had embraced sex segregation.

The race discrimination paradigm thus proved a significant advance in that it enabled African American communities to voice their objections to sex segregation, and, in many instances, to end the practice once and for all. However, the racial motivation standard entailed significant drawbacks. First, by allowing school districts to advance “educational purposes” as a defense, the standard encouraged the manufacture of race-neutral explanations that obscured the true impetus behind sex segregation. School districts had a strong incentive—if not a tactical imperative—to turn litigation over Jane Crow into a dispute over the virtues of single-sex- versus co-education. Despite their continuing conviction that sex separation was necessary to stem white flight and the withdrawal of public school funding, school officials began to downplay sex segregation’s origins in racial desegregation panic, focusing instead on the merits of single-sex schooling and the shortcomings of coeducation.

Second, the racial motivation standard focused attention on the purpose or motivation underlying sex segregation, but the longer-term determinants of African Americans’ attitudes toward Jane Crow turned out

374. *Guess Who's Coming to Dinner*, the Sidney Poitier film depicting the reaction of a white woman's liberal parents to her decision to wed an African American man, is perhaps the best-known reflection of changing views of interracial marriage in mainstream American culture. *GUESS WHO'S COMING TO DINNER* (Columbia Pictures, 1967). For more on the changing cultural context during this period, see ROMANO, *supra* note 27, at 175-215.

375. On the nature of the constitutional harm identified in *McLaughlin* and *Loving*, as opposed to the harm addressed in *Brown*, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1501-05 (2004).

to be more complicated, as we saw in Part IV. A comparison between two demographically similar school districts in Georgia and Mississippi suggests that in communities where whites kept their children and financial resources in the schools and where black and white teachers and administrators successfully cooperated in a racially integrated environment, African Americans tolerated sex segregation as a long-term transitional measure. In contrast, where whites fled the public schools and withdrew their financial support, but retained administrative control over now-predominantly black schools, African American opposition to Jane Crow escalated during the 1970s. Thus the animating purpose or intent of sex segregation—the primary object of the racial motivation standard’s inquiry—may have been less important in the long run than its practical effects on white behavior and on black educational self-determination.³⁷⁶

Finally, the racial motivation standard, untouched as it was by any recognition of emerging anti-sex discrimination norms, enabled school districts to utilize a set of gender-based assumptions about the proper education of boys and girls in their enumeration of the valid “educational purposes” underlying sex segregation. This second phase of the Jane Crow debate provides a striking example of how accepted gender norms could stand in for discredited, or at least sharply contested, racial beliefs. In constructing “educational purposes,” school districts reached for rationales that reflected widely-held attitudes regarding sex differences, gender roles, and sexuality. They suggested, in effect, that even if Americans disagreed about the merits of racial segregation, all could agree that girls and boys differed in important ways, that providing sex-specific training to students was sensible and economically efficient, and that separating the sexes could help to mitigate “disciplinary” and “sex” “problems” in the schools. Jane Crow’s defenders hoped that as racial barriers fell, a gender consensus might stem the tide of social change, or at least save public education from white flight and financial insolvency.³⁷⁷

The race-neutral justifications offered by school districts evinced no concern whatever about the possibility of a sex discrimination challenge to Jane Crow, although in hindsight, the “educational purposes” justifications appear to invite such a challenge. That challenge soon came, for the very gender consensus that defendant school districts had relied upon was unraveling rapidly. The third phase of the sex segregation debate, described in Part III, witnessed an unprecedented proliferation of legal tools with which to combat discrimination based on sex, including a new

376. On the gap between the goals of civil rights lawyers and those of their clients with respect to educational desegregation, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

377. For fascinating discussions of the interplay between gender and race in the emergence of railroad segregation, see BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* (2001); and Barbara Y. Welke, *When All the Women Were White and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914*, 13 L. & HIST. REV. 261 (1995).

constitutional sex equality jurisprudence and statutory weapons like Title IX and the EEOA. Significantly, the feminist legal arsenal relied heavily on an analogy between sex and race discrimination, and the battle over Jane Crow was no exception. The first widely-read treatment of the "Constitutionality of Sex Separation in School Desegregation Plans," published in 1970, argued that sex segregation inflicted psychological and material harms on girls similar to those imposed upon African American children by Jim Crow. Organizations like the ACLU, NOW, and the League of Women Voters followed suit. *Helwig v. Jefferson Parish School Board*, filed in 1974, made sex discrimination the centerpiece of an assault on sex segregation that eventually broadened to include school districts throughout the South. By the time the AFSC issued its report on Title IX implementation in Southern schools in 1977, a fully-developed sex discrimination argument, based upon a deliberate parallel to racial segregation, had become the centerpiece of the legal discourse on Jane Crow.

The sex discrimination argument against Jane Crow had considerable appeal. First, it made legally cognizable the objections that local women's rights advocates in communities like Jefferson Parish raised against sex segregation. There, local activists had been concerned about sex segregation's effects on girls since at least the late 1960s, and saw their efforts as part of a wider effort to eradicate sex discrimination in education and other realms. Notably, the sex discrimination argument enjoyed a potentially large and powerful constituency—white women—whose grievances might move white school officials to action where African American protests had not. Even without this grassroots impetus, the mere availability of sex discrimination theories and precedents, when race discrimination arguments alone had failed to move courts, may well have brought these arguments to the forefront. Lawyers challenging sex segregation would have been remiss had they not exploited the emerging constitutional sex equality jurisprudence, Title IX, the EEOA, and the other legal tools newly at their disposal.

These available sex discrimination theories drew in large part on an analogy to race: Ginsburg's WRP had argued that sex-based classifications should, like classifications based on race, be strictly scrutinized as suspect; Title IX, as John David Skrentny has shown, was the product of a race-sex analogy as well.³⁷⁸ Basing the sex discrimination argument on an analogy to racial segregation offered significant advantages. For one thing, comparing sex segregation to Jim Crow helped to recast what had been seen as benign differences in treatment as invidious discrimination. After all, as Robert Barnett reminded his readers in 1970, "the actions of the dominant groups toward both blacks and women were thought to be in the best interest of the subordinate

378. SKRENTNY, *supra* note 194, at 230-62.

groups.”³⁷⁹ Advocates had to convince legal decisionmakers that just as these debilitating racial attitudes required exposure and deliberate eradication, so did long-accepted principles of sex-based differentiation and subordination.³⁸⁰

Further, the particular trajectory of the legal debate over sex segregation militated in favor of arguments that focused on harm to girls, as the analogy-based sex discrimination argument did. The racial motivation standard encouraged school districts to emphasize the educational rationale for single-sex education, and the justifications they cited often relied on theories of sex difference that reinforced the very gender stereotypes that Title IX and the Court’s new sex equality jurisprudence repudiated. The pedagogical benefits that Jane Crow school districts attributed to sex segregation mostly accrued to boys, according to the theory that the pressures of female competition undermined male gender identity and academic performance. The analogy-based sex discrimination paradigm effectively changed the subject from whether single-sex education helped boys to whether it harmed girls, enabling advocates to answer school districts’ “educational purposes” arguments when they were unable to prove “racial motivation” to a court’s satisfaction.

If opponents of race and sex segregation could benefit from including sex discrimination arguments in their legal arsenal, the women’s movement, conversely, had much to gain from introducing the Jane Crow cases into sex equality doctrine. The race-sex analogy ran into trouble in cases like *Vorchheimer* in large part because judges saw sex segregation as benignly intended. The Southern sex segregation cases more vividly presented a policy arguably based—to invert the language of the Third Circuit majority—not on a theory of “equal benefit,” but on one of “discriminatory denial.” The Jane Crow fact patterns thus supplied the invidious intent element missing from cases like *Vorchheimer*, laying bare the underbelly of sex segregation in a nation riven by racial and class divisions. Feminists knew that they might be able to prevail without convincing judges to see sex segregation as exactly parallel to racial segregation. But by the mid-1970s, they also knew that the comparison was unavoidable. A factual context in which race and sex segregation were deeply intertwined helped them to make the case that nefarious purposes often lurked behind the seemingly benign façade of social science evidence and the “wisdom of the ages.”

Like the racial motivation standard, the sex discrimination argument against sex segregation also exhibited both substantive and strategic flaws. As we saw in Part IV, the developing legal discourse of sex discrimination failed to capture fully what African Americans articulated as the harm of sex segregation. Emphasizing sex segregation’s detrimental effect on girls

379. Barnett, Note, *supra* note 186, at 313.

380. For more on the rhetorical and persuasive power of race-sex analogies, see Mayeri, *supra* note 189.

minimized the extent to which the harm of segregation afflicted boys. The analogy-based paradigm placed a premium on the subordination of one group to another, rather than recognizing that segregation might harm all students by imposing rigid sex roles on both boys and girls. For the African American community of Amite County, Mississippi, the injury of sex segregation extended to both sexes: Jane Crow curtailed curricular choices for boys who wished to learn home economics as well as for girls who wanted to take shop. If anything, the psychological stigma of sex segregation particularly affected black boys, whose alleged propensity to prey upon white girls animated the policy. Boys also bore many of the material disadvantages of sex segregation, since they attended formerly black schools while the better-equipped white facilities were reserved for girls.³⁸¹ Further, thinking about Jane Crow and Jim Crow as analogues, like talking about the plight of girls as monolithic, obscured the extent to which sex segregation may have affected white and black girls quite differently.³⁸²

The dominant legal sex discrimination paradigm, based as it was on an analogy to race, also had profound strategic drawbacks as a constitutional argument. When the Jane Crow cases failed to reach the Supreme Court, the *Vorchheimer* litigation provided the Justices' only opportunity to address the legality of sex-segregated public secondary schools. Despite Ginsburg's best efforts to frame sex discrimination on its own terms, through a limited, rather than a full-blown analogy to Jim Crow, the question of whether sex-segregated schooling was, like racial segregation, "inherently unequal," haunted Susan Vorchheimer's supporters. Analogical arguments about the harm of sex segregation proved too much: most judges were unwilling to accept a full-fledged parallel between race and sex segregation, and so long as unsympathetic jurists could frame the question as one of analogy or dis-analogy, the sex discrimination argument was doomed to fail.

The sex discrimination argument was not uniquely flawed: as we have seen, each phase of the legal discourse on Jane Crow obscured, in some way, sex segregation's harm as articulated by the affected parties. Ironically, the race and sex discrimination paradigms that developed to combat sex segregation also shielded certain aspects of the Jane Crow debate itself from critical scrutiny. Perhaps the most striking way in which the legal discourse masked the underlying issues at stake in disputants' out-of-court discussions was the way in which the anti-discrimination

381. For an intriguing discussion of *Brown's* stigma rationale and its relationship to African American ambivalence toward school desegregation, see Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991 (2004).

382. As I have argued elsewhere, analogical arguments about race and sex discrimination did not necessarily obscure the position of women of color; in fact, African American feminists originally invoked such analogies for precisely the opposite purpose. See Mayeri, *supra* note 189. For more on the differential effects of sex segregation on different groups of women and girls, see, for example, sources cited *supra* note 4.

model failed to challenge, or even to confront, presuppositions about children's sociability and sexuality that animated supporters and opponents of sex segregation. In the first phase of the Jane Crow debate, assumptions about adolescent sexuality and interracial intimacy lurked close to the surface. Before concerns about race and sex discrimination intervened, the entire justification for sex segregation rested upon the notion that children who attended school together would attain the physical and social proximity that inevitably would lead to relationships with students of the opposite sex. But under the racial motivation standard, it behooved Jane Crow's defenders to downplay the fears of interracial intimacy that underpinned sex segregation schemes; instead, disputants referred to "sex problems" and "disciplinary problems" associated with coeducation. The sex discrimination argument, by focusing on the subordination of girls under sex segregation, similarly distracted from emotionally fraught issues of sexual intimacy and maturation. Anti-discrimination discourse avoided facing head-on the deep-seated ideas about "natural" social and sexual behavior that both opponents and proponents of sex segregation invoked.

In contrast, disputants outside the legal arena were still engaging these issues. For instance, proponents of coeducation frequently referred to the education of boys and girls together as "natural" and "healthy." They warned that children would be unable to function in the real world if they did not learn to understand and interact with members of the opposite sex. Some suggested that students would not find mates, or would choose poorly, or would not learn appropriate masculine or feminine behavior, or would resort to homosexuality as a result of sex-segregated schooling. On this view, it was sex segregation, not racial desegregation, that disrupted "normal" cross-sex relationships and deprived parents and communities of control over their children's education.

The evolving anti-discrimination discourse made no mention of the extent to which arguments both for and against sex segregation were premised on an assumption of normative heterosexuality. Boys and girls would be distracted by the presence of the opposite sex, argued proponents of sex segregation, who implicitly assumed not only that sexual attraction constituted a harmful distraction, but also that boys would not be distracted by other boys, nor girls by other girls. Opponents, on the other hand, warned that single-sex schools fostered homosexual behavior and prevented boys and girls from engaging in the interactions necessary to form healthy heterosocial ties. Such arguments implied that heterosexual bonds were a natural part of socialization, endangered by exclusively homosocial exposure. Of course, they also presupposed that homosexuality was unnatural and undesirable.

The legal discourse of Jane Crow exposed and creatively redefined the constitutional harm of sex segregation, adapting to, and in turn, shaping, anti-segregation advocacy and strategy. But anti-discrimination discourse

had difficulty capturing the complex interactions between racial ideologies, gender politics, and sexuality embodied in the theory and practice of Jane Crow. Racial motivation proved impossible to separate from educational purposes, which were themselves inextricably linked to assumptions about gender roles, sociability, and sexuality. Nor could legal advocacy effectively balance principled opposition to Jane Crow with the pragmatic calculus that led some communities to accept sex segregation as an unfortunate but necessary alternative to racial strife and the impoverishment of the public school system. Jane Crow, born of both panic and practicality, profound cynicism and cautious optimism, virulent extremism and pragmatic moderation, remained complex and multivalent as it reflected and shaped the trajectory of anti-discrimination law and discourse.